DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-658
Title: Jeff Premo, Superintendent, Oregon State Penitentiary, Petitioner
v.
Randy Joseph Moore
Docketed: December 7, 2009
Linked with 09A358
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-15713)
Decision Date: July 28, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 15 2009	Application (09A358) to extend the time to file a petition for a writ of certiorari from October 26, 2009 to November 25, 2009, submitted to Justice Kennedy.
Oct 19 2009	Application (09A358) granted by Justice Kennedy extending the time to file until November 25, 2009.
Nov 24 2009	Petition for a writ of certiorari filed. (Response due January 6, 2010)
Jan 6 2010	Brief of respondent Randy Joseph Moore in opposition filed.
Jan 6 2010	Motion for leave to proceed in forma pauperis filed by respondent.
Jan 15 2010	Reply of petitioner Brian Belleque, Superintendent, Oregon State Penitentiary filed. (Distributed)
Jan 20 2010	DISTRIBUTED for Conference of February 19, 2010.
Feb 22 2010	DISTRIBUTED for Conference of February 26, 2010.
Mar 1 2010	DISTRIBUTED for Conference of March 5, 2010.
Mar 15 2010	DISTRIBUTED for Conference of March 19, 2010.
Mar 22 2010	Petition GRANTED.
Mar 22 2010	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Apr 30 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including June 25, 2010.
Apr 30 2010	The time within which to file respondent's brief on the merits is extended to and including August 13, 2010.
Jun 24 2010	Joint appendix filed. (Statement of costs filed)
Jun 24 2010	Brief of petitioner Jeff Premo, Superintendent, Oregon State Penitentiary filed.
Jul 1 2010	Brief amici curiae of South Carolina, et al. filed.
Jul 2 2010	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Jul 20 2010	SET FOR ARGUMENT ON Tuesday, October 12, 2010.
Jul 29 2010	U.S.D.C record received from Chamber of Judge Reinhardt of the U.S.C.A. for

	9th Circuit. (1 box)
Jul 29 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Aug 5 2010	CIRCULATED.
Aug 13 2010	Brief of respondent Randy Joseph Moore filed. (Distributed)
Sep 7 2010	Justice Kagan is recused in this case.
Sep 10 2010	Reply of petitioner Jeff Premo, Superintendent, Oregon State Penitentiary filed. (Distributed)
Oct 12 2010	Argued. For petitioner: John R. Kruger, Attorney General, Salem, Ore. For respondent: Steven T. Wax, Federal Public Defender, Portland, Ore.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No. 09-658

In the Supreme Court of the United States

BRIAN BELLEQUE, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

RANDY JOSEPH MOORE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court established in *Hill v. Lockhart* the standard for assessing, in a collateral challenge to a conviction that was based on a guilty or no-contest plea, whether an attorney's deficient performance requires reversal of a conviction. In *Arizona v. Fulminante*—a direct appellate review case—this Court reviewed all the evidence presented at trial and held that the erroneous admission of a coerced confession at the trial was not harmless.

a. If a collateral challenge is based on a defense attorney's decision not to move to suppress a confession prior to a guilty or no contest plea, does the *Fulminante* standard apply, even though no record of a trial is available for review?

b. Even if the *Fulminante* standard applies in that context, is it "clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1)?

2. In Moore's underlying criminal case, he confessed to police that he personally shot the victim. He also confessed to two other people, and he ultimately pleaded no contest to murder. In his collateral challenge to his conviction, he alleged that his attorney should have moved to suppress the confession to police, but he offered no evidence that he would have insisted on going to trial had counsel done so. Did the Ninth Circuit err by granting federal habeas relief on Moore's ineffective-assistance-of-counsel claim?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian Belleque, Superintendent of the Oregon State Penitentiary, respectfully petitions this Court for a writ of certiorari to review the Ninth Circuit's decision in *Moore v. Czerniak*, 574 F.3d 1092 (9th Cir. 2009). Review is warranted for the following reasons:

(1) The Ninth Circuit's decision conflicts with this Court's decisions concerning the standards for issuing a writ of habeas corpus. The Ninth Circuit acknowledged that *Strickland v. Washington*, 466 U.S. 668 (1984), applies generally to claims of ineffective assistance of counsel and that *Hill v. Lockhart*, 474 U.S. 52 (1985), governs ineffective-assistance claims if the petitioner waived trial and pleaded guilty. However, the court effectively supplanted those cases with one applicable to direct appeals from trials—*Arizona v. Fulminante*, 499 U.S. 279 (1991). Under *Hill*, a petitioner in a collateral challenge who was convicted by a guilty plea establishes prejudice by proving that, but for counsel's unreasonable error, he would have insisted on going to trial. Notwithstanding *Strickland* and *Hill*, the court in this case held that its analysis of counsel's error and the impact of that error were governed by *Fulminant*—apparently because both *Fulminante* and this case involved a confession.

Yet *Fulminante* involved direct appellate review of a conviction. There, this Court held that the erroneous admission of a confession at trial can be reviewed for harmless error, the same as any other evidentiary error by a trial court, by reviewing the remaining evidence to determine whether the admission of the

confession was harmless beyond a reasonable doubt. 499 U.S. at 310-11. *Fulminante* has no relevance to collateral review of a trial attorney's performance where the criminal case was resolved by a guilty or no-contest plea and consequently there is no other evidentiary record to review for harmless error.

In a related error, the Ninth Circuit declared that *Fulminante* is "clearly established Federal law" under 28 U.S.C. § 2254(d)(1) for purposes of determining whether a petitioner was prejudiced by trial counsel's failure to move to suppress a confession. That holding is contrary to this Court's recent interpretations of section 2254(d)(1)—because this Court has never applied *Fulminante* in the manner the Ninth Circuit did here, *a fortiori Fulminante* cannot be "clearly established Federal law" for conducting the prejudice analysis in a collateral challenge to a conviction.

(2) The Ninth's Circuit's decision creates a split among the circuits, as no other circuit court of appeals has applied *Fulminante* in a collateral challenge to a criminal conviction. In defending a criminal conviction against collateral attack, only states in the Ninth Circuit must now make a record for review as though the underlying criminal case had gone to trial.

(3) Thousands of criminal convictions are in jeopardy as a result of the Ninth Circuit's new approach to federal habeas corpus cases, because the vast majority of criminal cases are resolved by plea agreements, often before any pretrial motions are filed. The Ninth Circuit decision thus affects a significant number of convictions. Further, it affects—in a significant fashion—the manner in which collateral

challenges to those convictions must be litigated. With no trial or hearing in cases where a defendant pleaded guilty, there is no evidentiary record in those cases for a court in a collateral-review proceeding to conduct a *Fulminante*–type harmless-error analysis. Finally, this decision shifts the burden of proof in the collateral review proceeding from the petitioner to the state, by forcing the state to present the evidence of a petitioner's guilt that would have been presented years earlier if the petitioner had not pleaded guilty or no contest.

STATEMENT OF THE CASE

A. Underlying state court criminal proceeding

1. Moore confessed to his brother and a friend, and later to police, that he shot Kenneth Rogers in the course of an assault and kidnapping.

On December 7, 1995, Moore, Lonnie Woolhiser, and Roy Salyer assaulted Kenneth Rogers in his residence, bound him with duct tape, forced him into the trunk of a car, drove him to a remote location, and killed him with a single gunshot to the head from close range. App. 72; App. 173. Before being charged with a crime, Moore confessed to his brother and a friend, and then to police, but he claimed that the shooting was accidental. In addition to those confessions, Moore consistently admitted to his attorney that he shot the victim during a kidnapping and assault. App. 70-71, 74.

2. Pursuant to plea negotiations, Moore pleaded no contest to felony murder; his attorney did not move to suppress Moore's confession to police.

The state initially charged Moore with felony murder, kidnapping, and assault. (C.R. 28, exhibit 112, petition for state post-conviction relief). Pursuant to plea negotiations, however, Moore waived grand jury indictment, and the district attorney submitted an information charging him with one count of murder with a firearm, to which Moore pleaded no contest. App. 81; App 209-10. Before Moore pleaded no contest, the trial court conducted a thorough colloquy with Moore to establish that his plea was knowing, voluntary, and intelligently made. App. 213-22. Moore received the mandatory minimum 300-month sentence of imprisonment with lifetime post-prison supervision. App. 181.

B. In a state collateral review proceeding, the Oregon courts rejected Moore's claim that his trial attorney was ineffective for failing to move to suppress Moore's confession to police.

Moore sought post-conviction relief in state court.[1] He alleged, among other claims, that his trial counsel rendered ineffective assistance, in violation of the

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[1] Oregon's process to collaterally challenge a conviction is known as a post-conviction relief proceeding. *See* Or. Rev. Stat. § 138.510 *et seq*,

Sixth Amendment, by failing to move to suppress his confession to police. App. 198-201.

In an affidavit prepared for the state post-conviction proceeding, Moore's trial attorney recounted his handling of the case, setting out in detail his discussions with Moore. *See generally* App 69-77.[2] Counsel explained that he had decided not to file a motion to suppress Moore's confession to the police in part because, even without that confession, the state could present evidence of two other "full" confessions Moore had made:

> 4. * * * Mr. Moore had previously given a full confession to his brother Raymond Moore and to a woman named Debbie Ziegler. Mr. Moore and I discussed the possibility of filing a Motion to Suppress and concluded that it would be unavailing, because in the first place, he knew he was not in custody at the time he gave the recorded interview and that the statement was voluntary, and in the second place, he had previously made a full confession to his brother and to Ms. Ziegler, either one of whom could have been called as a witness at any time to repeat his confession in full detail.

App. 70. The police were aware of those two earlier confessions when they interviewed Moore (C.R. 28, exhibit 115, p. 50), and Moore has never contended in

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[2] The attorney's complete affidavit is Appendix B to the Ninth Circuit's decision.

any proceeding that those two other confessions could have been suppressed.

Moore's counsel also discussed with Moore the risks of waiting for a grand jury indictment and proceeding to trial versus the benefits of plea bargaining and obtaining early resolution of the case:

> 6. I believe that I reviewed every aspect of the law and the facts regarding this case. I discussed the case at length with Mr. Moore and reviewed the extensive police reports * * *. I do not recollect any material statement of fact in the police report with which Mr. Moore disagreed. Mr. Moore always claimed his actual shooting of the victim was an accident, but there was never the smallest doubt that it occurred during a kidnap which began as an assault. We discussed at length the felony murder rule. * * * I made it very clear to Mr. Moore that he was not charged with aggravated murder and that in fact, the grand jury had not yet considered his case, so that the options were fully open for the district attorney to seek whatever charge or charges the district attorney thought might be justified.[3]

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[3] Moore was charged with felony murder in violation of Or. Rev. Stat. § 163.115(1)(b). If felony murder is committed "personally and intentionally," it is aggravated murder under Or. Rev. Stat. § 163.150(2)(d). Moreover, based on other circumstances of the crime, counsel warned Moore that a charge of aggravated murder was possible. App. 71-72. Aggravated murder carries possible sentences of death,

* * * * *

14. Mr. Moore and I discussed at great length whether it was in his best interest to try to press the case to early resolution or to waive all time constraints for speedy trial and immediate indictment in an attempt to secure the best possible resolution of the case. * * *

* * * * *

16. I never coerced Mr. Moore into doing anything. I have been practicing law since 1967 and have always served exclusively as defense counsel. The negotiated plea which we entered into with the district attorney did not include any charges of Measure 11 assault or Measure 11 kidnapping.[4] I thought that it was the best we could do under the circumstances and I told Mr. Moore this.* * *

17. I informed Mr. Moore that I frankly believed if we went to trial he would be found guilty of assault, kidnapping, and murder (as was his codefendant, Roy Salyer, who chose

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life without parole, or life with parole after 30 years. *See* Or. Rev. Stat. § 163.105(1) (1994).

[4] "Measure 11" refers to certain crimes, including assault and kidnapping, that carry mandatory minimum sentences under Or. Rev. Stat. § 137.700. Those sentences cannot be shortened by "good time" while in prison, and they could conceivably have been imposed consecutively if Moore had been convicted of murder, assault, and kidnapping.

> trial as an option), but I did not presume to tell Mr. Moore what he should do. * * *

App. 71, 75-76.

Moore and his brother, Raymond Moore, testified at the state post-conviction hearing about the circumstances surrounding Moore's confession to police. (C.R. 28, exhibit 122 at 7-32). However, Moore presented no evidence that he would have rejected the plea offer, or that he would have insisted on going to trial, if his attorney had successfully moved to suppress his confession.[5]

The state post-conviction court wrote that it "believe[d] trial counsel's affidavit" (App. 201), and ruled:

> 8. Counsel further explains that he did not move to suppress because petitioner had previously confessed his participation in the crime to his brother (Raymond Moore) and another friend. Both Raymond Moore and the friend could have been called as witnesses to repeat petitioner's confession. (Ex 108, Jordan Aff, p 2). A motion to suppress would have been fruitless.
>
> 9. The Court finds that there is very little chance that petitioner's confession would have

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[5] In contrast, Moore testified in a deposition that he would not have pleaded no contest if he had understood that his sentence would include a lifetime term of post-prison supervision. (C.R. 28, exhibit 114 at 12). He did not pursue that claim in this federal habeas action.

> been suppressed. Given petitioner's confession, counsel obtained the best plea offer he could for petitioner and petitioner accepted the offer after careful consideration.

App. 205. The court also ruled that Moore's claims that he did not understand "the results and the nature of his plea" were "unfounded." App. 205. The court ruled that Moore had failed to prove that he was entitled to relief under *Strickland v. Washington*, 466 U.S. 668 (1984) (requiring a petitioner to prove both that counsel's performance was unreasonable and that the petitioner was prejudiced). App. 206. The state appellate courts rejected Moore's appeal of the post-conviction court's judgment. *Moore v. Palmateer*, 174 Or. App. 321, 26 P.3d 191, *rev. denied*, 332 Or. 430, 30 P.3d 1184 (2001).

C. Federal habeas corpus proceedings

1. The district court ruled that Moore's confession was involuntary but that trial counsel reasonably decided not to move to suppress it; the court also ruled that Moore was not prejudiced by counsel's decision, because he would have pleaded no contest regardless.

Moore next sought federal habeas corpus relief and ultimately chose to pursue only one issue: "[W]hether trial counsel was constitutionally ineffective for failing to adequately investigate and move to suppress petitioner's inculpatory statements to police." App. 184. The federal magistrate judge ruled that Moore's confession was involuntary because the

police had given him implied promises of leniency. App. 188-90. Nonetheless, she concluded that Moore's trial counsel reasonably decided not to move to suppress based on the following facts: (1) Moore had confessed to Raymond Moore and to Debbie Ziegler before he spoke to the police; (2) if the case had gone to trial, Raymond Moore and Ziegler "could have been called to testify to the same statements petitioner made to the authorities"; and (3) codefendant Salyer had told police details of the murder before Moore confessed to police. App. 190-92. The magistrate judge concluded that Moore's confession to police would have been "redundant," and that Moore's attorney's performance "did not fall below an objective standard of reasonableness" when he chose not to move to suppress Moore's confession. App. 192.

The magistrate judge further ruled that Moore had not demonstrated that he suffered prejudice "since his decision to enter pleas of no contest would not have changed given his prior confessions to Moore and Ziegler, as well as Salyer's demonstrated willingness to cooperate with the police." App. 192.

The district court adopted the magistrate judge's findings and recommendation in their entirety and denied the petition. App. 194-96.

2. The Ninth Circuit reversed the district court, ruling both that Moore's counsel unreasonably failed to move to suppress the confession and that Moore was prejudiced by that failure.

The Ninth Circuit reversed the district court's denial of habeas relief. *Moore v. Czerniak*, 534 F.3d 1128 (9th Cir. 2008). The superintendent timely filed a petition for rehearing and suggestion for rehearing en banc. The Ninth Circuit denied rehearing en banc, and issued a replacement opinion that largely mirrors the initial opinion. *Moore v. Czerniak*, 574 F.3d 1092 (9th Cir. 2009).[6]

a. The Ninth Circuit ruled that *Arizona v. Fulminante* is the applicable "clearly established" federal law to review claims that trial counsel was constitutionally ineffective for failing to move to suppress a confession.

In an opinion by Judge Reinhardt, the Ninth Circuit first recognized that a claim of ineffective assistance of counsel is governed by *Strickland v. Washington*, 466 U.S. 668 (1984), and that *Strickland* applies "in the plea, as well as the trial, context" under *Hill v. Lockhart*, 474 U.S. 52 (1985). Yet the court then identified *Arizona v. Fulminante*, 499 U.S. 279

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[6] The opinion from the denial of rehearing en banc consists of five separate opinions: the majority, a concurrence, and three dissents.

(1991), rather than *Hill*, as the controlling authority for analyzing whether Moore was prejudiced by his attorney's failure to move to suppress the confession:

> In the context of a plea bargain, we specifically ask whether there is a reasonable probability that, but for counsel's deficient performance, the petitioner would have gone to trial rather than accept the plea bargain offered by the state. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Because Moore's claim involves the failure to suppress a confession, the prejudice question is governed by *Fulminante*, 499 U.S. 279, the guiding Supreme Court precedent on the harmlessness of an erroneously admitted confession.

App. 19.

Applying that newly announced standard, the court ruled that the state post-conviction court's "prejudice determination constituted 'an unreasonable application of[] clearly established Federal law' under 28 U.S.C. § 2254(d)(1)."[7] The court expressly identified *Arizona v. Fulminante* as the applicable "clearly established" federal law that the state court failed to apply when reviewing Moore's claim of ineffective assistance of counsel. App. 41.

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[7] 28 U.S.C. § 2254(d)(1) provides that a writ of habeas corpus may be issued only if the state court unreasonably applies "clearly established Federal law, as determined by the Supreme Court of the United States."

b. The dissent concluded that the state courts did not misapply the relevant clearly established federal law—that is, *Strickland v. Washington* and *Hill v. Lockhart*—in rejecting Moore's claim.

In dissent, Judge Bybee wrote that the majority opinion clearly establishes a "dramatic proposition":

> In the process of second-guessing counsel, the Oregon courts, and the district court, the majority clearly establishes a dramatic proposition: After *Kimmelman v. Morrison*, 477 U.S. 365 (1986), *Strickland v. Washington*, 466 U.S. 668 (1984), and *Arizona v. Fulminante*, when a motion to suppress a confession is potentially "meritorious," counsel's failure to file the motion constitutes deficient and prejudicial conduct if there is any possibility that filing the motion would have caused a defendant to choose a trial over the plea. * * * According to the majority, if counsel has any grounds for moving to suppress a confession and there is any possibility the defendant would have gone to trial, the failure to move for suppression satisfies both prongs of *Strickland*. It is, absolutely, error and, absolutely, prejudicial.

App. 96-97.

The dissent would have affirmed the district court's denial of the writ on the ground that the state courts did not misapply the controlling Supreme Court authority. Applying *Strickland*, the dissent

wrote that Moore's counsel reasonably chose not to move to suppress the confession, given the strength of the state's case against Moore and the benefits Moore obtained through an early resolution of the case. App. 97-115. Applying *Hill* (App. 115-31), the dissent wrote that Moore had failed to establish that he was prejudiced by his counsel's decision not to move to suppress the confession: "There is no reason to believe that Moore would have gone to trial." App. 115. The dissent then explained why the majority's reliance on *Fulminante* is wrong. App. 131-39.

The dissent also concluded that the majority's holding "forces defense counsel to file any motions to suppress a confession that a panel of federal judges later might determine to be meritorious[.]" App. 112-13. That requirement, according to the dissent, directly conflicts with *Knowles v. Mirzayance*, 556 U.S. ___, 129 S. Ct. 1411 (2009), which rejected the proposition that an attorney must pursue a strategy if there is "nothing to lose" by following that strategy. App. 100-02. *See also* App. 114, n. 10 (expressing concern about expansion into other areas of pretrial motion practice).

A second dissent, in which Judge Callahan dissented from the order denying rehearing en banc, echoed Judge Bybee's concerns that the majority failed to follow the *Strickland* standard and that the decision conflicts with *Mirzayance*. App. 153-65. And a third dissent, authored by Judge Bea, noted that the panel majority reweighed the evidence, disregarded the state court's factual findings, and shifted the burden of proof from Moore to the defending su-

perintendent, in conflict with *Woodford v. Visciotti*, 537 U.S. 19 (2002). App. 165-71. Judge Bea concluded that "it strains credulity to claim that the state court's decision was contrary to or an unreasonable application of the *Fulminante* decision." App. 170-71.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision conflicts with this Court's authorities in two ways. First, it effectively substitutes *Arizona v. Fulminante* for *Strickland v. Washington* and *Hill v. Lockhart*, by directing courts to use *Fulminante*'s direct-appeal, harmless-error standard of review when conducting collateral reviews of criminal convictions. Second, in a related but slightly different error, the decision identifies *Fulminante* as "clearly established Federal law" for the purpose of determining prejudice in claims of ineffective assistance of counsel where the conviction was obtained by a guilty plea. But *Hill* already identifies the appropriate prejudice standard for those circumstances, and *Strickland* already identifies the appropriate general standard for reviewing claims of ineffective assistance of counsel.

The decision also conflicts with all other circuits, requiring courts in the Ninth Circuit alone to use *Fulminante* when conducting collateral reviews of criminal convictions.

Finally, the decision will affect thousands of cases on collateral review, because the vast majority of criminal cases—approximately 95% of felony convictions according to one study—are resolved by plea agreements. Moreover, the decision not only affects a

significant number of cases, but it significantly will affect the *manner* in which those cases are resolved on collateral review. Indeed, application of the Ninth Circuit's standard will require a complete change in how collateral-review cases are litigated. To conduct a *Fulminante* direct-appeal, harmless-error review in a collateral proceeding, as now required in the Ninth Circuit, the parties will have to make a record for review as though the underlying criminal case had gone to trial. Played out in practical terms, the new test necessarily will shift the burden of proof in the collateral proceeding from the petitioner to the state. That burden-shifting also conflicts with the long-standing requirement that a federal habeas corpus petitioner must prove his claims for relief.

A. The Ninth Circuit effectively substituted the direct-appeal, harmless-error standard announced in *Arizona v. Fulminante* for the collateral review standards this Court announced in *Strickland v. Washington* and *Hill v. Lockhart*.

The "clearly established Federal law" that governs claims of ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668 (1984). *Williams v. Taylor*, 529 U.S. 362, 391 (2000).[8] Under *Strickland*,

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[8] 28 U.S.C. § 2254(d)(1) provides that a writ of habeas corpus may be issued only if the state court unreasonably applied "clearly established Federal law, as determined by the Supreme Court of the United States." *See also Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (a federal habeas court may not issue the writ unless the state court's decision is objectively unreasonable under the governing legal princi-

a petitioner claiming ineffective assistance of trial counsel must show (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Bell v. Cone*, 535 U.S. 685, 695 (2002). In other words, the petitioner must prove both that counsel committed an unreasonable error and that the error prejudiced the petitioner. For the last 25 years, this Court has consistently applied that general standard, most recently in *Wong v. Belmontes*, 558 US. ___ (November 16, 2009); *Bobby v. Van Hook*, 558 U.S. ___ (November 9, 2009); *Knowles v. Mirzayance*, 556 U.S. ___, 129 S. Ct. 1411 (2009).

For convictions that were obtained by a guilty plea rather than by a trial, this Court has required petitioners to satisfy *Strickland*'s prejudice prong in a particular manner. A petitioner who pleaded guilty proves prejudice by demonstrating a reasonable probability that, "but for counsel's errors, *he would not have pleaded guilty and would have insisted on going to trial*." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (emphasis added).[9]

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ples set forth by the Supreme Court at the time the state court rendered its decision).

[9] Although *Hill* specifically addressed collateral challenges to convictions obtained by guilty plea and although Moore pleaded no contest, *Hill* applies here. That is so because the *Hill* standard derives from a recognition that convictions secured by plea agreements are fundamentally

Here, while ostensibly acknowledging *Strickland* and the more-specific *Hill* standard for determining prejudice in plea cases, the Ninth Circuit effectively supplanted them by identifying *Arizona v. Fulminante* as the applicable "clearly established Federal law" for determining whether Moore was prejudiced by his counsel's failure to move to suppress his confession. Yet *Fulminante* simply does not, and cannot, govern the prejudice analysis for this kind of collateral challenge to a conviction.

In *Fulminante*, this Court held—on direct appellate review of the conviction—that the erroneous admission of an involuntary confession *at trial* may be reviewed for harmless error, and reiterated the pertinent harmless-error standard:

> When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, *simply reviews the remainder of the evidence against the defendant* to determine whether the admission of the confession was harmless beyond a reasonable doubt.

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different from those secured by trials. *See Hill*, 474 U.S. at 56-57. Those fundamental differences, for purposes of collateral review, exist whether the defendant pleaded guilty or no contest. *Cf. Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000) (equating the decision to plead guilty with waiver of trial: "the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant").

499 U.S. at 310-11 (emphasis added). The Court then held—on the particular facts of that case—that the erroneous admission of the defendant's involuntary confession was not harmless. *Id.* at 296-300.

Because the Ninth Circuit's new standard is based on *Fulminante*, it does not focus—as directed by *Hill*—on whether a petitioner "would not have pleaded guilty and would have insisted on going to trial" if his attorney had moved to suppress a confession. Instead, the decision instructs courts to do the following when reviewing a claim that an attorney failed to move to suppress a confession before the petitioner pleaded guilty: (1) determine whether the unlitigated motion would have had merit, and (2) conduct a direct-appeal, harmless-error analysis, as described in *Fulminante*. As explained below, that new standard shifts the burden of proof from the petitioner to the state.

The Ninth Circuit's decision also disregards the fundamental differences between convictions obtained by plea and convictions obtained by a trial. As a result, the decision conflicts with this Court's case law that limits the scope of collateral review for convictions obtained by a guilty or no-contest plea. Even before *Hill* (and as acknowledged in *Hill*), this Court explained that a defendant who pleads guilty is in "a different posture" than a defendant who is convicted following a trial:

> He is convicted on his counseled admission in open court that he committed the crime charged against him. *The prior confession is not the basis for the judgment, has never been*

> *offered in evidence at a trial, and may never be offered in evidence.*

McMann v. Richardson, 397 U.S. 759, 773 (1970) (emphasis added).

Since *McMann*, this Court has continued to recognize, for purposes of collateral review, the fundamental differences between convictions secured by plea agreements versus convictions by trial. *See, e.g., United States v. Ruiz*, 536 U.S. 622, 629 (2002) (a prosecutor is not required to turn over impeachment materials before a defendant decides to plead guilty, because impeachment information "is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*." (emphasis in original)); *United States v. Broce*, 488 U.S. 563, 569 (1989) (in a collateral challenge to a conviction obtained by a guilty plea, "the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack."); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (a defendant who pleads guilty upon the advice of counsel may attack the validity of the plea only by showing that counsel's advice "was not within the standards set forth in *McMann*.").

The Ninth Circuit decision, by applying *Fulminante*'s direct-appeal, harmless-error standard to a conviction secured by a no-contest plea, conflicts with this line of cases as well.

B. The Ninth Circuit's identification of *Fulminante* as the applicable "clearly established Federal law" for purposes of determining prejudice conflicts with this Court's recent interpretations of section 2254(d)(1).

This Court recently has addressed the phrase "clearly established Federal law" in 28 U.S.C. § 2254(d)(1). The Ninth Circuit's identification of *Fulminante* as the applicable "clearly established Federal law" for determining whether a petitioner who pleaded guilty or no contest was prejudiced by his attorney's failure to move to suppress a confession conflicts with those decisions. In contrast to the Ninth Circuit's expansive interpretation of the phrase, this Court has moved toward a much narrower interpretation, equating "clearly established Federal law" with federal law that has been explicitly articulated by this Court's holdings.

For example, in *Carey v. Musladin*, 549 U.S. 70, 77 (2006), a habeas petitioner alleged that he was denied the right to a fair trial, because spectators in the courtroom had worn buttons bearing a photograph of the murdered victim. The Ninth Circuit allowed relief, holding that *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), were the applicable "clearly established Federal law" for purposes of habeas corpus review. This Court disagreed:

> *Given the lack of holdings from this Court* regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state

> court "unreasonabl[y] appli[ed] clearly established Federal law." § 2254(d)(1). *No holding of this Court required the California Court of Appeal to apply the test of Williams and Flynn to the spectators' conduct here.* Therefore, the state court's decision was not contrary to or an unreasonable application of clearly established federal law.

549 U.S. at 77 (emphasis added).

In *Wright v. Van Patten*, 552 U.S. 120, 128 S. Ct. 743, 744 (2008) (*per curiam*), the Court reiterated that federal law can be deemed "clearly established" only if this Court's case law already provides a "clear answer" to the precise question presented. In *Wright*, the Seventh Circuit granted habeas relief on a petitioner's claim that he had been denied the right to counsel at a plea hearing, because his attorney was present only by speaker phone. The Seventh Circuit ruled that the applicable clearly established federal law was *United States v. Cronic*, 466 U.S. 648 (1984), rather than *Strickland v. Washington*.[10] 128 S. Ct. at 744. This Court reversed because "[n]o decision of this Court, however, squarely addresses the issue in this case * * * or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context." *Id.* at 746. As in *Musladin*, the Court "could not say" that the state court had unreasonably applied clearly es-

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[10] In contrast to *Strickland*'s requirement that a petitioner prove prejudice, *Cronic* holds that, in rare circumstances, reviewing courts will presume that the petitioner was prejudiced. 466 U.S. at 659-60.

tablished federal law because "our cases give no clear answer to the question presented, let alone one in Van Patten's favor." *Id.* at 747.

Here, the Ninth Circuit has made the same error that this Court reversed in *Musladin* and *Van Patten*: It identified an inapposite decision—*Arizona v. Fulminante*—as the clearly established federal law that the state court had been required to apply when it reviewed Moore's claim against his attorney, and then it held that the state court unreasonably applied that inapposite authority. This Court has never held that *Fulminante* applies in a collateral proceeding to determine whether a petitioner was prejudiced by his attorney's failure to move to suppress a confession. The Ninth Circuit's insistence that *Fulminante* nonetheless reflects "clearly established Federal law" for purposes of this case conflicts with this Court's construction of 28 U.S.C. § 2254(d)(1).

C. The Ninth Circuit's decision conflicts with all other circuits.

Only the Ninth Circuit has imported the direct-appeal standard of review set out in *Fulminante* into collateral review of criminal convictions. Thus, all the criminal convictions in the Ninth Circuit that were obtained by plea agreements will be subjected to a different standard of collateral review, compared to convictions obtained by guilty pleas elsewhere in the country. And, as explained in the next section, all the

states in the circuit[11] will carry a heavier burden to defend those convictions than in any other circuit.

D. The Ninth Circuit's decision will affect the collateral review of thousands of convictions that were obtained through plea agreements rather than by trial.

1. The majority of felony convictions are obtained through plea agreements rather than trial.

The overwhelming number of plea agreements that are entered in state courts each year,[12] and the enormous cost of indigent defense in state courts (a total of over $2.8 billion in 2002)[13] demonstrate the critical interest that states and prosecutors have in the finality of convictions. In *Hill* itself, this Court

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[11] The Ninth Circuit encompasses Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the Territory of Guam.

[12] In 2004, state courts convicted an estimated 1,079,000 adults of a felony, and 95% of those defendants pleaded guilty. Matthew Dunrose and Patrick Lanagan, Felony Sentences in State Courts, 2004, Bureau of Justice Statistics, July 2007 at 1-2, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf (last visited November 13, 2009).

[13] The Spangenberg Group, American Bar Association Bar Information Program, State and County Expenditures for Indigent Defense Services in Fiscal Year 2002, at 35 (2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf (last visited November 20, 2009).

emphasized the importance of finality to convictions generally, and to guilty pleas in particular:

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. *The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas.* Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.

474 U.S. at 58, quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (internal citations omitted; emphasis added).

In short, the Ninth Circuit's decision will affect a significant number of convictions. Moreover, it will serve only to undermine—rather than to promote—the finality of convictions obtained by guilty pleas.

2. To apply the Ninth Circuit's new standard, the states will be required to present, in the collateral review proceeding, the case that they would have presented had the petitioner not waived trial in the underlying criminal proceeding.

In addition, the Ninth Circuit decision will significantly transform the manner in which collateral challenges to guilty-plea convictions must be litigated. As set out above, *Fulminante* provides that, to determine

on direct appeal whether the erroneous admission of an involuntary confession was harmless beyond a reasonable doubt, the reviewing court "simply reviews the remainder of the evidence against the defendant[.]" 499 U.S. at 310-11. The Ninth Circuit's new standard requires the reviewing court in a collateral proceeding to conduct that same kind of review. In other words, to address the issues that must be considered under this new standard—*i.e.*, to conduct a *Fulminante*-type, direct-appeal, harmless-error review in a collateral proceeding—the parties must anticipate and litigate what *would have happened if* the case had gone to trial without the petitioner's inadmissible confession.

This Court, albeit in *dicta*, has already disapproved of the very litigation process that the Ninth Circuit's new standard will force the parties and the courts in collateral review proceedings to engage in:

> What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but *whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof.* It might be suggested that if *Jackson* [*v. Denno*, 378 U.S. 368 (1964)] had been the law when the pleas in the cases below were made—if the judge had been required to rule on the voluntariness of challenged confessions at a trial—there would have been a better chance of keeping the confessions from the jury and there

> would have been no guilty pleas. But because of inherent uncertainty in guilty-plea advice, this is a highly speculative matter in any particular case and *not an issue promising a meaningful and productive evidentiary hearing long after entry of the guilty plea*. The alternative would be a *per se* constitutional rule invalidating all New York guilty pleas that were motivated by confessions and that were entered prior to *Jackson*.

McMann, 397 U.S. at 773-774 (emphasis added).

The inherent difficulties of implementing the Ninth Circuit's new standard are demonstrated in this very case. To accomplish the goal of granting relief to Moore, the Ninth Circuit repeatedly speculated about the evidence that *might have been offered*, if Moore had chosen to go to trial back in 1996 instead of pleading no contest, and about decisions that Moore or the state *might have made* under different circumstances:

- "Such a formal confession would, without question, be far more persuasive to a jury than Moore's statements to two lay witnesses – statements that [Raymond Moore and Debbie Ziegler] might or might not have been willing to recount, but that would in any event have lacked the flavor, details, specificity, and completeness of the taped confession." App. 44.
- "Without Moore's formal, taped confession, the state's case would have been far weaker." App. 46.

- "It is likely that, without the benefit of Moore's formal, tape-recorded confession to the police officers, the state would not have been able to secure a plea on the basis of the informal confessions." App. 47.
- "[E]ven if the state had subpoenaed Raymond [Moore] to testify, knowing him to be a hostile witness, it is unlikely that it would have been able to elicit much of the information it desired from him." App. 48-49.
- "[I]t is far from clear" what Raymond Moore and Debbie Ziegler "would have said or to what extent their testimony would have been persuasive to a jury, although it is certain that their second-hand reports would not have been nearly as damaging as Moore's own taped confession." App. 47-48.
- "Without Moore's confession and the other evidence it produced, Moore likely would not have been convicted of, or even charged with felony murder, but rather would have faced some lesser charge." App. 51-52.

In a final rejection of well-established authority, the Ninth Circuit's new standard shifts the burden of proof from the petitioner to the state, even though a petitioner always carries the burden of proof in a federal habeas corpus action, and, in this case, Moore had the burden of proof in his state collateral-review challenge. *See Wong v. Belmontes*, 558 US. ___, (November 16, 2009; slip opinion 13) ("*Strickland* places the burden on the defendant, not the State, to show a

"reasonable probability" that the result would have been different."); Or. Rev. Stat. § 138.620(2) (in a post-conviction proceeding, the "burden of proof of facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence.").

Although the Ninth Circuit did not acknowledge this burden-shifting, it necessarily will occur when these cases play out in the collateral review arena. To enable the court in a collateral proceeding to "review the remainder of the evidence against the defendant," as instructed by *Fulminante*, the parties in that proceeding will have to present the evidence that would have been put on if the case originally had gone to trial. If no evidence is presented, petitioner wins—because, after excising the inadmissible involuntary confession, the "remainder of the evidence" will be nothing. Thus, to defend the conviction, the state will be forced to present its trial case, years after the petitioner pleaded guilty and with all the pitfalls that come from long delays before trial is conducted—faded memories, lost physical evidence, missing witnesses.

Again, this very case demonstrates the burden-shifting that will occur under the Ninth Circuit's new standard. For example, Moore submitted no evidence to establish that his confessions to Raymond Moore and Debbie Ziegler were less extensive than his confession to the police, to establish that they were inadmissible, or to establish that he would have insisted on going to trial if those two confessions—but not his confession to police—were available to the

state for trial. Yet the court wrote that Moore was entitled to relief because, in part, "the record falls far short of establishing that the potential testimony of Raymond and Ziegler would have been sufficient to cause Moore to accept so harsh a plea agreement[.]" App. 48. If, in fact, Moore would not have accepted the plea offer, *Hill v. Lockhart* required him to prove that fact in the state post-conviction proceeding. The Ninth Circuit turned *Hill* on its head, requiring the state to prove that, if Moore's attorney had moved to suppress his confession to police, Moore *would have* taken the plea offer, rather than requiring Moore to prove that he *would not have* taken it. By granting relief in the absence of evidence that ordinarily would be relevant under *Strickland* and *Hill*, the Ninth Circuit demonstrated that it had shifted the burden of proof from Moore to the state.

There will be no finality to convictions obtained through plea negotiations if constitutionally valid guilty or no-contest pleas—such as Moore's—can be overturned simply by showing that trial counsel failed to file a meritorious motion to suppress a confession, regardless of other circumstances that existed at the time and even if the petitioner offers no evidence that he would have gone to trial had counsel filed the motion. By sidestepping *Strickland* and *Hill* rather than faithfully applying them, the Ninth Circuit has created confusion and tipped the scales in favor of petitioners who seek to overturn convictions that were obtained through plea agreements.

E. The Ninth Circuit erred by granting relief, because Moore failed to prove either that his counsel unreasonably chose not to move to suppress the confession or that he suffered prejudice as a result.

The district court correctly concluded that Moore's counsel reasonably chose not to move to suppress Moore's confession to police, even if the motion would have been successful. By looking at the *entirety* of counsel's affidavit—as the state court, the district court, and the Ninth Circuit dissenters did—it is readily apparent that counsel's strategic choice to forgo the motion was interwoven with the plea negotiation discussions. *See* App. 112 (J. Bybee, dissenting: the majority "largely ignores the obvious strategic reasons detailed in counsel's affidavit that counsel had to advise Moore to take the plea"). The Ninth Circuit disregarded those "obvious strategic reasons" not to move to suppress only because Moore's attorney did not expressly state that the plea negotiations influenced his decision not to challenge the confession. App. 35-36, n. 16 (citing only two paragraphs of the affidavit).[14]

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[14] The majority opinion also repeatedly asserts that the state "conceded" that Moore's confession to the police was unconstitutionally obtained. *See, e.g.*, App. 3 ("Randy Moore's taped confession was obtained by the police at the station house by means that even the state concedes were unconstitutional.") and App. 64 ("Had Moore's counsel filed a motion to suppress on the ground the state concedes is meritorious"). But no such concessions ever were made. Rather, the state made no argument about whether

Reading counsel's affidavit fairly, the only correct legal conclusion to be drawn is that he reasonably focused on the big picture and reasonably chose not to challenge Moore's confession. Moore was not prejudiced by that choice, and he has never made any effort to carry the burden of proof that *Hill* places on him—he has never offered any evidence to prove that he would have insisted on going to trial if counsel had moved to suppress his confession to police.

By ignoring Moore's failure to satisfy that burden, the Ninth Circuit issued a decision that conflicts with this Court's case law, and it did so in a manner that affects a significant number of cases in a significant manner.

CONCLUSION

This Court should grant this petition to clarify that *Hill v. Lockhart* remains the applicable "clearly established Federal law" under 28 U.S.C. § 2254(d)(1) for determining whether a petitioner who pleaded guilty or no contest was prejudiced by unreasonable errors made by counsel before the petitioner enters

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the confession was inadmissible because it was apparent—under all the circumstances of the case—that Moore's trial attorney reasonably chose not to move to suppress that one confession, and that Moore's no-contest plea was constitutionally valid, because it was knowing, voluntary, and intelligently made.

the plea, and to clarify that *Fulminante* does not alter that approach simply because the claim relates to an attorney's failure to move to suppress a confession.

Respectfully submitted,

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November 24, 2009

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RANDY JOSEPH MOORE,

Petitioner-Appellant,

vs.

STAN CZERNIAK, Superintendent of OSP,

Respondent-Appellee.

No. 04-15713

D.C. No. CV-01-01795-AJB/JMS

ORDER AND OPINION

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Argued and Submitted
March 10, 2005—Portland, Oregon

Filed July 28, 2009

Before: Stephen Reinhardt, Marsha S. Berzon, and Jay S. Bybee, Circuit Judges.

Order;
Opinion by Judge Reinhardt;
Concurrence by Judge Berzon;
Dissent by Judge Bybee;
Dissent to Order by Judge Callahan;
Dissent to Order by Judge Bea

COUNSEL

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Hardy Myers, Attorney General for the State of Oregon, Mary H. Williams, Solicitor General (On the Briefs); Jennifer S. Lloyd, Attorney-In-Charge, Collateral Remedies and Capital Appeals Unit, Salem, Oregon (Argued), for the respondent-appellee.

ORDER

The majority opinion, concurring opinion, and dissenting opinion filed on July 28, 2008, slip op. 9397, and appearing at 534 F.3d 1128 (9th Cir. 2008), are withdrawn. A new majority opinion, concurring opinion, and dissenting opinion are filed contemporaneously with this order. With the filing of the new opinion, Judge Reinhardt and Judge Berzon vote to deny the petitions for rehearing and rehearing en banc. Judge Bybee votes to grant the petitions for rehearing and rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35. Judge Graber was recused. The petitions for rehearing and rehearing enbanc are denied. No future petitions for rehearing or rehearing en banc will be entertained.

OPINION

REINHARDT, Circuit Judge:

Randy Moore's taped confession was obtained by the police at the station house by means that even the state concedes were unconstitutional. It does not contest on this appeal the district court's finding that Moore's confession was involuntary. As the Supreme Court has declared emphatically, "[a] confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.' " *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139 (1968) (White, J., dissenting)). Inexplicably, Moore's lawyer failed to recognize that the confession to the police was inadmissible, even though it wasunconstitutional for not one but two separate reasons.

Counsel's explanation for not filing the motion was, in his words, "two-fold." First, he thought such a motion would not have succeeded because Moore was not in custody when he gave his confession and his confession was voluntary—both clearly erroneous conclusions: the confession was impermissibly extracted as the result of a promise of leniency made by the interrogating officers, and it was also obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981), as Moore had asked for counsel before making the confession but his request had been ignored. Second, Moore's lawyer erroneously thought that the taped confession was not prejudicial because Moore had told

his brother and his half-brother's girlfriend about the crime. In both respects, Moore's lawyer exhibited a remarkable lack of familiarity with, or basic misunderstanding of, controlling principles of constitutional law. As a result of his ineptitude—and, as his affidavit makes crystal clear, *not* because of any strategic reasons—he failed to make a motion to suppress the unconstitutionally obtained confession. Having determined not to file the motion, counsel advised Moore that a plea to felony murder was "the best [they] could do under the circumstances," and Moore pled no contest to that charge.

The state makes the same error as Moore's counsel. It urges that the failure to move to suppress Moore's taped confession to the police was not prejudicial because Moore had told two others about the crime, and *only* because he had done so. Unlike our highly imaginative and creative dissenting colleague, the state does *not* argue that it possessed other evidence, aside from the two other confessions, that rendered the failure to file the motion harmless. In fact, perhaps mindful of *Fulminante*'s command that, in cases such as this, reviewing courts "exercise extreme caution" before determining that the failure to move to exclude unconstitutional confessions is harmless, 499 U.S. at 296, the state does not challenge on any basis other than his statements to others Moore's assertion that the ineffectiveness of his counsel necessarily undermines our confidence in the outcome of the proceedings. Here, *Fulminante*'s dictate is all the more compelling because, unlike in *Fulminante*, where the challenged confession was made informally to a not particularly reliable layman, the confession

at issue is recorded, is in Moore's own voice, and was made in the formal context of a police interrogation.

In the end, there can be no serious doubt that Moore's counsel was ineffective and that Moore was deprived of his basic constitutional rights under the Sixth Amendment, as clearly established in *Strickland v. Washington*, 466 U.S. 668 (1984). The state court, following the same rationale advanced by the State and Moore's counsel, concluded that Moore's recorded confession to the police was nonprejudicial because of his prior statements to others, a conclusion that is contrary to the clearly established law of *Fulminante*. But for counsel's failure to move to suppress his involuntary confession, there is a reasonable probability that Moore would not have pled to the felony murder charge but would have instead insisted on going to trial—a trial at which he would have faced a potential sentence identical to that he received as a result of his plea bargain. Counsel's performance fell below an objective standard of reasonableness. Because we hold that the state court's rejection of Moore's federal constitutional claim was contrary to *Fulminante*, 499 U.S. 279, and constituted an objectively unreasonable application of *Strickland*, 466 U.S. 668, we reverse the district court and remand for issuance of the writ.[1]

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[1] The dissent, disregarding *Fulminante*'s commands, creates its own version of harmlessness in this case. It envisions a record that shows that the police were aware of a set of facts that would make conviction of felony murder inevitable regardless of the confession and its fruits, that counsel also knew these facts wholly aside from what his

I.

In December 1995, petitioner Randy Moore, his halfbrother Lonnie Woolhiser, and his friend Roy Salyer were allegedly involved in the assault, kidnapping, and death of Kenneth Rogers. After arresting Salyer and booking him in the county jail, the investigating police officers asked Moore and Woolhiser to come to the police station for questioning. The two were separated and interviews were conducted by different police detectives. Moore provided a brief statement about stopping by Rogers's motor home, waiting while Woolhiser and Salyer went in to talk to Rogers, and then leaving with Woolhiser and Salyer.

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client told him, and that all the overwhelming evidence the dissent posits was obtained from sources unrelated to Moore's and his co-defendant's unconstitutional confessions. Not only is there no evidence to support the dissent's wishful thinking as to the ideal set of facts that might have been, but are not, reflected in the record, but the dissent's analysis bears no resemblance to the issues or arguments raised by the state on appeal, the facts and circumstances found by the state post-conviction court, or the grounds upon which that court based its decision. Moreover, in a last gasp effort to save an unlawful conviction, the dissent represents that counsel failed to move to suppress the unconstitutional confession for reasons—strategic ones—that counsel's own affidavit makes clear were not reasons that motivated him. We recognize that our dissenting colleague believes that Moore deserves to be convicted, but disregarding the state's arguments as well as the state court record and findings, and substituting one's own, is hardly the manner in which federal appellate courts are supposed to determine appeals.

After making this statement, Moore was advised of and invoked his *Miranda* rights. Subsequently, as the district court found, both Moore and Woolhiser were released on the condition that they speak with their older brother Raymond Moore ("Raymond"), and return to the station at 1:00 p.m. the following day.

The police officers had good reason for directing Moore and Woolhiser to speak with Raymond. Raymond had a personal and working relationship with the investigating officers. Moreover, these officers had been involved in the investigation of a murder charge against Raymond that resulted from a separate killing. The charge was dropped when Raymond cooperated with the officers and explained that the killing was perpetrated in self-defense. Raymond testified later that because Moore and Woolhiser told him that Rogers's death was an accident, he believed that the police officers would do the same for his brother and half-brother as they had for him, if they cooperated in the same manner he had.

The next day, after speaking with Raymond, Moore and Woolhiser spent the morning unsuccessfully trying to obtain legal representation. When they called the police station at 1:10 p.m., the police promptly ordered them to return for further questioning: "they told us that if we were not there by 3:00 they would come get us—[ ] and our family would not like the way they did it and they—we knew what they meant." In accordance with the police officers' commands, Moore and Woolhiser returned to the police station that afternoon, without counsel. They were

accompanied by Raymond, and also by Woolhiser's girlfriend, Debbie Ziegler.

When the four arrived at the police station, the investigating officers began another round of questioning. Moore interrupted at the very beginning of that questioning to request counsel: "You see . . . until I, I have to be able to talk to somebody that's on my side, you know, for me, to be able to go tell nobody . . . I don't trust my judgment right now." When the police officers ignored Moore's request, Woolhiser reiterated by stating, "You know, we'd just like to talk to somebody, you know." Moore then stated that he wanted to, "[a]s quick as possible, talk to a lawyer," which was followed by Raymond's confirmation of that request: "If there was some way we could maybe get an attorney in here for a consultation." Eventually, in response, the police officers told Moore and Woolhiser that they were not entitled to counsel at that time unless they could afford it themselves. The police officers then promptly proceeded with the interrogation.

During the interrogation, the police officers told Moore and Woolhiser that they "would go to bat for [them] as long as [they] got the truth," to which Moore responded: "See that's what I want to hear." At this point, Raymond interrupted the questioning to vouch for the officers' assurances, stating that "I know in my, this is for myself, saying, there was once an officer, and I said hey, look, I want out, I did something and been doing something. I want out of this, I want a chance. And this officer said, okay, Ray, I'll go to bat for you. And that officer's your captain." Build-

ing on Raymond's account, one of the interrogating officers asked, "But he did go to bat for you[?]," to which Raymond responded, "That's exactly right . . . . I talked to him and he stood behind his word one hundred percent and he's probably one of the best friends I have in the world."

After Raymond's comments, the interrogating officers emphasized that the police could be similarly helpful to Moore and Woolhiser if they confessed. Moore first hesitated, but then indicated that he would be willing to talk. At this point, one of the officers told Moore, "Okay, so that you know you're going to get a fair shake from us alright, I want to verify that with our DA that he is not going and [sic] turn around and jam you. I want him to tell me right now on the phone that you can change your mind and he will accept it. So there's no jammin' down the road, okay?" The officer then left to obtain the verification that the DA would not "jam" Moore so long as he confessed.

When the officer returned, he told Moore that he had spoken with the DA—"our Deputy DA actually"—and then proceeded to elicit Moore's confession. Before doing so, however, he extracted several statements from Moore regarding his custody status and the voluntariness of the confession he was about to give. In response to a series of questions, Moore agreed with the officers that he had voluntarily returned to the police station, that he was not in custody, that the police had offered nothing in exchange for his confession other than that they would make a "recommendation[ ]" to the District Attorney, and

that he understood his right to counsel and was waiving it.[2] In short, as one of the interrogating officers explained: "[t]he main thing is we want everybody on this recording to know that you guys are not in custody . . . [a]nd this is not an . . . in custody interrogation type of thing."

In the recorded confession that he then made, Moore described how he, Salyer, and Woolhiser went to Rogers's home after Salyer informed the two that Rogers had stolen property from his cabin. Moore stated that Woolhiser confronted Rogers about the theft, assaulted him, and placed him in the trunk of a car. They then drove Rogers to a remote wooded area and began to walk him blindfolded up a hill. At some point during this walk, Woolhiser handed Moore a loaded gun. Moore explained that they had no intention of killing Rogers; they were simply going to frighten him by leaving him on top of the hill and forcing him to find his way back home. As the four climbed the hill, however, Rogers stumbled and fell back into Moore, causing the gun in his hands to dis-

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[2] Although the officers continued their efforts to obtain answers to their questions, they acknowledged, after their call to the District Attorney, that they had been "wrong" in earlier informing Moore that he was entitled to a lawyer only if he could afford one; immediately before Moore gave his statement, the officers stated that if Moore wanted a "court appointed attorney [he could] have one at this time," but that if he wanted to "go ahead and talk" with the officers, he could do that instead. This statement, of course, conflicts with the state's representation that Moore was not in custody.

charge. As a result, Rogers died of an accidental gunshot wound to the head.

Following his confession, Moore was appointed counsel and charged with one count of felony murder with a firearm. He entered a plea of no contest, and was given a mandatory sentence of twenty-five years imprisonment, with five years to be served concurrently as a sentencing enhancement for the use of a firearm, in addition to a life term of post-prison supervision.[3] Moore appealed his sentence to the Oregon Court of Appeals, which affirmed without opinion, and to the Oregon Supreme Court, which denied review. *State v. Moore*, 951 P.2d 204 (Or. Ct. App. 1997), *rev. denied*, 953 P.2d 395 (Or. 1998).

Shortly thereafter, Moore filed a petition for state postconviction relief, alleging, *inter alia*, that he had been denied effective assistance of counsel because his lawyer had failed to file a motion to suppress his confession. The state court held an evidentiary hearing at which Moore and his brother Raymond testified. Raymond recalled that the detectives "made it

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[3] Moore was sentenced under what is termed "Measure 11." Approved by Oregon voters in November 1994, Ballot Measure 11 imposed lengthy mandatory minimum sentences, with no possibility of reduction, for certain crimes against persons, including felony murder. Act effective June 30, 1995, ch. 421, sec. 1, 1995 Or. Laws 1072 (codified as amended at Or. Rev. Stat. § 137.700 (2003)) (listing crimes covered by Measure 11). Further, under such a sentence, Moore was not eligible "during the service of the term of imprisonment . . . for release on post-prison supervision or any form of temporary leave from custody." *Id.*

appear" that Moore and Woolhiser were not in custody, but that it was clear from the circumstances that they were not free to leave. He also testified that he advised the pair to confess their involvement in Rogers's death because he understood that the police had promised leniency: "[B]asically what I had deducted [sic] from what they had said was that they would work for [Moore] like they had worked for me to change my life around."

Moore also testified that he understood the officers' statements to be an assurance that his crime would be charged as an accidental killing rather than felony murder. He stated that the officers "left me believing that the D.A. had agreed not to jab us down the road . . . . [W]hen the detective went and talked to the D.A. to make sure he wasn't going to jab me, I thought there was an agreement that they were going to charge me with accidental death and the D.A. had agreed to it because he didn't come back saying that he did not agree, and that's what he went there for." Moreover, Moore explained that during the interrogation, he did not feel free to leave, in part because detectives had made it clear on the evening prior to the interview that Salyer had already been charged and that they were going to be booked that day.

After the evidentiary hearing, the state court filed an unpublished order denying Moore's post-conviction petition. With regard to the ineffective assistance of counsel claim, the state court first concluded that it was reasonable for counsel to believe that a motion to suppress would be without merit. In so finding, the state court relied on counsel's affidavit, which as-

sented that because Moore admitted on tape that he was not in custody and "never believed that he was in custody," there was no merit to the claim that the police officers improperly denied him counsel in a custodial interrogation. The state court further found that the officers' questions regarding custody would have constituted notice to a reasonable person that he was free to leave and was not being held in custody. As a result, the state court found that there "was no basis for filing a motion to suppress." It did not mention the involuntariness claim.

Relying solely on the affidavit of Moore's trial counsel, the state court further reasoned that even if a motion to suppress had been filed and granted, it would have been "fruitless" because Moore "had previously confessed his participation in the crime to his brother (Raymond Moore) and another friend [Debbie Ziegler]." From this, the state court concluded that Moore suffered no prejudice because "[b]oth Raymond Moore and [Ziegler] could have been called as witnesses to repeat petitioner's confession." It made no findings as to what Moore had told Raymond or Ziegler about the crime or as to the specific facts to which they might have been able to testify. Specifically, the state court did not determine whether Moore simply confessed to the two laymen that he had killed the victim accidentally, or whether his informal confession covered all of the elements required to prove a felony murder. The state court found only that Moore had "confessed" to them. Based on the above, the state court held that counsel's failure to file a motion to suppress his taped confession did not constitute ineffective assistance of counsel. The Ore-

gon Court of Appeals affirmed without opinion and the Oregon Supreme Court denied review. *See Moore v. Palmateer*, 26 P.3d 191 (Or. Ct. App. 2001), *rev. denied*, 30 P.3d 1184 (Or. 2001).

In December 2001, Moore petitioned the United States District Court for the District of Oregon for a writ of habeas corpus. He raised, *inter alia*, the ineffective assistance of counsel claim that was denied in the state courts. Adopting the magistrate judge's findings and recommendation, the district court found that the state court was not unreasonable in concluding that Moore was not in custody at the time of his request for counsel, but that he had "confessed to Rogers' murder based on [a] false promise" of leniency, which "rendered [his] confession involuntary." Nevertheless, the court concluded that "counsel's failure to seek suppression did not necessarily fall below an objective standard of reasonableness" because of Moore's prior confessions to Raymond Moore and Debbie Ziegler and the potential adverse testimony of Salyer.[4] On that basis, the district court ultimately

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[4] We consider the issues regarding Raymond Moore and Debbie Ziegler later in our opinion. We note here, however, that the district court clearly erred with respect to Salyer. There is no evidence in the record to suggest that the state could have or would have relied on Salyer's testimony. Certainly, it makes no such assertion on appeal. Indeed, until the district court made the *sua sponte* determination regarding Salyer, no interested party—the state court, Moore's trial counsel, or the state itself—had suggested that the taped confession was non-prejudicial because of Salyer's potential testimony. Moreover, in light of the Supreme Court's recognition of the inherent unreli-

held that the postconviction court's conclusion that there had not been a constitutional violation was "neither contrary to, nor an unreasonable application of, *Strickland v. Washington*."

This appeal followed. Because the state does not contest the district court's finding that Moore's confession was involuntary, and because we conclude

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ability of a co-defendant's testimony, the state would certainly not have believed that, without Moore's taped confession, Salyer's testimony could have given it the same chance of obtaining a conviction. *See, e.g., Lee v. Illinois*, 476 U.S. 530, 545 (1986) ("[A] codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another."); *see also Crawford v. Washington*, 541 U.S. 36, 59 (2004) (explaining that *Lee v. Illinois* "is not . . . contrary" to modern Confrontation Clause jurisprudence). Under these circumstances, it was mere supposition for the district court to suggest that Salyer would be able to offer sufficient inculpatory testimony to render the failure to suppress Moore's formal confession nonprejudicial. Most important of all, however, there can be little doubt that Salyer would not have testified against Moore but would have taken the Fifth Amendment, as he faced a trial himself on charges arising from the same incident. Even had Salyer been convicted before Moore's trial began, he would in all likelihood have taken the Fifth because he continued to challenge his conviction all the way through 2005, when his federal habeas petition was denied, *see Salyer v. Belleque*, 2005 WL 555403 (D. Or. Mar. 4, 2005).

that the state court unreasonably erred with respect to its finding of "no prejudice," we reverse. We hold that the state court's adjudication of Moore's claim "resulted in a decision that . . . involved an unreasonable application of[ ] clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), and remand to the district court with instructions to grant the writ of habeas corpus.

II.

This court reviews *de novo* the district court's decision to deny a petition for a writ of habeas corpus. *See DePetris v. Kuykendall*, 239 F.3d 1057, 1061 (9th Cir. 2001). Factual findings relevant to the district court's decision to grant or deny the petition are reviewed for clear error. *See Solis v. Garcia*, 219 F.3d 922, 926 (9th Cir. 2000). Moore's federal habeas petition was filed after April 24, 1996, and is therefore governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254. *Woodford v. Garceau*, 538 U.S. 202, 210 (2003). Under AEDPA, we may grant habeas relief only when the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).[5]

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[5] Although we can overturn a state court's decision only if it is contrary to, or an unreasonable application of,

"[C]learly established Federal law" includes only the Supreme Court's "applicable holdings," not its dicta. *See Carey v. Musladin*, 127 S. Ct. 649, 653 (2006). There need not be a narrow Supreme Court holding precisely on point, however—a state court can render a decision that is "contrary to" or an "unreasonable application" of Supreme Court law by "ignoring the fundamental principles established by [that Court's] most relevant precedents." *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1671 (2007).

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clearly established federal law as determined by the Supreme Court, decisions from this court and other circuits are of persuasive weight in regard to "whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and . . . what law is 'clearly established.' " *Duhaime v. DuCharme*, 200 F.3d 597, 600-01 (9th Cir. 2000). This is especially true if the fact pattern of the lower court decision is substantially similar to the case being decided. *See Ouber v. Guarino*, 293 F.3d 19, 26 (1st Cir. 2002) ("To the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue." (internal quotation marks and citation omitted)). Prior decisions of this court that make it clear that we are applying clearly established Supreme Court law or that a particular application of Supreme Court law is unreasonable constitute binding precedent on that point. Otherwise, were an identical case to come before us the following month, we would have to undertake the identical analytical exercise all over again, instead of simply relying on the fact that we had just done so and had already resolved the question.

A state court's decision is " 'contrary to' federal law if it fails to apply the correct controlling Supreme Court authority or comes to a different conclusion . . . [from] a case involving materially indistinguishable facts." *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002) (citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court's decision is an "unreasonable application" of Supreme Court law if "the state court correctly identifies the governing legal principle . . . but unreasonably applies it to the facts of the particular case." *Bell*, 535 U.S. at 694. The Supreme Court has held that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

The substantive federal law guiding our inquiry is supplied by *Strickland v. Washington*, 466 U.S. 668 (1984), which is "clearly established Federal law" under AEDPA. *Williams*, 529 U.S. at 391. To prevail on a claim of ineffective assistance of counsel under *Strickland*, Moore must demonstrate both that his counsel's representation was deficient—in other words, that it "fell below an objective standard of reasonableness"—and that the deficiency was prejudicial. *Strickland*, 466 U.S. at 687-88, 692. To show prejudice, Moore must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

outcome."[6] *Id.* at 694. In the context of a plea bargain, we specifically ask whether there is a reasonable probability that, but for counsel's deficient performance, the petitioner would have gone to trial rather than accept the plea bargain offered by the state. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Because Moore's claim involves the failure to suppress a confession, the prejudice question is governed by *Fulminante*, 499 U.S. 279, the guiding Supreme Court precedent on the harmlessness of an erroneously admitted confession. As *Fulminante* commands, we must "exercise extreme caution" before determining that the failure to move to suppress a coerced confession was nonprejudicial. *Fulminante*, 499 U.S. at 296.

III.

We address *Strickland*'s performance prong first. In Part III.A, we consider whether Moore's attorney rendered deficient performance in failing to file a motion to dismiss Moore's confession. Moore's counsel provided two reasons why he did not file such a motion: first, he believed that a motion would not be

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[6] For *Strickland* claims, it is unnecessary to conduct a harmless error analysis under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *Avila v. Galaza*, 297 F.3d 911, 918 n.7 (9th Cir. 2002) ("We need not conduct a harmless error review of *Strickland* violations under *Brecht* . . . , because '[t]he *Strickland* prejudice analysis is complete in itself; there is no place for an additional harmless-error review.' " (quoting *Jackson v. Calderon*, 211 F.3d 1148, 1154 n.2 (9th Cir. 2000))); *see also Kyles v. Whitley*, 514 U.S. 419, 435-36 & n.9 (1995).

meritorious, and second, he believed that even if a motion were to succeed, it would make no difference to the outcome because Moore had confessed informally to two lay persons. As noted above, the state does not dispute on appeal that a suppression motion would have been meritorious. Thus, the sole issue as to deficient performance is whether counsel's conclusion that a motion to suppress Moore's formal, taped confession would have been purposeless in light of his two informal confessions "fell below an objective standard of reasonableness." Because this question is essentially one of prejudice, our deficient performance analysis turns largely on whether counsel's failure to move to suppress the taped confession affected the outcome of the plea process. We conclude, in Part III.B, that it did. Thus, because both of counsel's stated reasons for not filing the motion were patently erroneous, and because the detailed, taped confession Moore gave to the police was highly damaging, we hold that counsel's performance "fell below an objective standard of reasonableness" and, as such, was constitutionally deficient. For the reasons explained below, we also hold that the state court's conclusion that counsel's failure to file the motion was not prejudicial was contrary to *Fulminante* and constituted an unreasonable application of *Strickland* and *Hill*.

A. Deficient Performance

The Supreme Court has clearly established that "a single, serious error may support a claim of ineffective assistance of counsel"—including counsel's failure to file a motion to suppress. *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986). In applying the defi-

cient performance prong of *Strickland* to cases in which the alleged ineffective assistance consists of counsel's failure to file such a motion, the Court has stated that the underlying claim—the claim purportedly requiring suppression—must be "meritorious." *Id.* at 375, 382; *see also Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1170 (9th Cir. 2003) (same). However, "the failure to file a [meritorious] suppression motion does not constitute *per se* ineffective assistance of counsel." *Kimmelman*, 477 U.S. at 384; *see also id.* at 382 ("Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim [involving counsel's failure to file a motion to suppress], a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief."). Rather, to satisfy *Strickland*'s performance prong, the habeas petitioner must show that his counsel's failure to file the meritorious motion to suppress "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Where, as here, the state asserts that filing a motion to suppress, even if meritorious, would have served no useful purpose because other evidence in its possession would establish the same facts, our inquiry with respect to deficient performance substantially overlaps with our inquiry regarding prejudice.[7]

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[7] The dissent characterizes our holding in this case as mandating that defense counsel must file any meritorious suppression motion. *See, e.g.*, dis. op. at 9838, 9841, 9850 & 9851 n.10. As the text notes, *Kimmelman* rejects that proposition, and so do we. As our later discussion indicates, *see infra* nn. 16, 20, there may be a valid reason why

In his affidavit, Moore's trial counsel stated two reasons and two reasons only for his decision not to file a motion to suppress (or, as counsel put it, his reasons for not filing a motion were "two-fold"): First, counsel believed that such a motion "would be unavailing"—i.e., not meritorious—because Moore "was not in custody at the time he gave the recorded interview and . . . the statement was voluntary." Second, counsel believed that, even if a motion to suppress Moore's confession were meritorious, filing it would make little difference because Moore "had previously made a full confession to his brother and to Ms. Ziegler, either one of whom could have been called as a witness at any time to repeat his confession in full detail." We hold that both of counsel's reasons for not filing the motion—that the motion was not meritorious on either ground, and that, even if it were, it would have served no purpose because of the other confessions—were erroneous. Given the highly damaging nature of Moore's taped confession to the police and the unconstitutionality of that confession, we hold that counsel's failure to move to suppress the confession "fell below an objective standard of reasonableness" and thus constituted deficient performance, and that the state court's conclusion to the contrary was contrary to *Fulminante* and an unreasonable application of *Strickland*.

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a competent lawyer might not file a potentially meritorious suppression motion, but Moore's counsel offered none here.

1. The state has conceded that a motion to suppress Moore's confession on involuntariness grounds would have been meritorious.

[1] Moore urges two grounds on which a motion to suppress his confession would have been meritorious: first, that his confession was procured during a custodial interrogation, after Moore had invoked his right to counsel, in violation of *Edwards v. Arizona*, 451 U.S. 477; and second, that his confession was involuntary, having been extracted as the result of a promise of leniency made by the interrogating officers. The state court concluded that a motion to suppress on the *Edwards* ground would not have been meritorious because Moore "was not in custody when he gave his statement." It did not, however, address the involuntariness question.[8] On federal habeas review, the district court agreed with the state court with respect to the *Edwards* issue but found that a motion to suppress would have been meritorious on the involuntariness ground.[9] Critically, the state does

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[8] It is unclear why the state court failed to address the involuntariness ground. Nevertheless, both parties agree that this issue was raised at the state court and therefore that it is properly before us.

[9] Specifically, the district court found that

> [a] reasonable person in [Moore]'s position would have concluded that an offer of leniency had been extended in exchange for a confession. It is clear [Moore] subjectively believed that this offer was made, and confessed to Rogers' murder based on this false promise. The false promise of leniency, made entirely believable by the continual refer-

not challenge the district court's determination on appeal. Thus, although we would ordinarily review the district court's factual findings for clear error, here we simply accept as correct the district court's finding that Moore's confession was involuntary—and, consequently, that a motion to suppress would have been meritorious on that ground.[10] Accordingly,

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ences and comparison's to [Raymond]' s prior situation, rendered [Moore]'s confession involuntary.

[10] We note, however, that had the state contested the district court's voluntariness determination, we could not conclude that the district court had erred, let alone clearly erred, in finding that Moore's confession was made in response to a false promise that the charges against him would be reduced if he confessed to accidentally killing Rogers. The officers repeatedly told Moore that they would "go to bat for him" if he confessed. More important, the officers reminded Moore of the experience of his brother Raymond, whose murder charges had been dismissed at their instigation when Raymond explained that the killing was accidental, and used Raymond's own personal reaffirmation of the events to convince Moore that his treatment would follow in the same vein. Throughout the interrogation, the officers implied that if he agreed to talk, Moore would receive the same treatment his brother did—that is, that the charges against him would be dropped, or, more likely, reduced from murder to a lesser offense. The officers also purported to clear the arrangement with the District Attorney, reassuring Moore that he would be taken care of as long as he told the truth. Given these facts, we fully agree with the district court's conclusion that the officers created an implied promise that Moore would not be charged with intentional murder or felony murder if he confessed to Rogers's accidental killing, and

we will not engage in an extensive discussion as to why a motion to suppress would also have been meritorious if based on the ground that Moore was in custody and had asked for, but not been granted, his right to counsel prior to the interrogation. However, because counsel's error on this ground buttresses our conclusion that his performance was highly deficient, we set forth briefly in the footnote appended hereto the reasons we conclude that counsel's failure to file on the *Edwards* ground was also objectively unreasonable.[11]

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that this promise was "sufficiently compelling to overbear [Moore's] will." *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988); *see Haynes v. Washington*, 373 U.S. 503, 513-14 (1963).

[11] Counsel's rationale for not moving to suppress on the *Edwards* ground was that Moore was not in custody when he was interrogated and confessed after he unsuccessfully invoked his right to counsel. The record clearly demonstrates the contrary, however. Moore had already been subjected to a custodial interrogation the previous day, a fact the state does not dispute. He was released from custody only on the condition that he return the following afternoon, when, the police told him, he would be formally booked. Moore was further informed the next day that if he and Raymond did not arrive at the station on time, the police "would come get [them] . . . and [their] family would not like the way they did it." At the station, the police told Moore that Salyer had already been charged and indicated that he too would be formally arrested and charged later that day. Faced with these facts, it is clear that a reasonable person in Moore's position—i.e., a person who knows that he is a prime suspect in a killing, that he will be

2. Counsel's failure to file a meritorious motion to suppress Moore's confession "fell below an objective standard of reasonableness" and thus constituted deficient performance.

[2] Having determined that a motion to suppress Moore's confession, had it been filed, would have been meritorious, we must now consider whether counsel's failure to file such a suppression motion was objectively unreasonable. We conclude that it was.

[3] Counsel's only explanation for not filing a motion to suppress, aside from his erroneous conclusion that such a motion lacked merit, was that he believed that suppressing Moore's taped confession to the police would be futile because Moore had also confessed to his brother and half-brother's girlfriend, and that "either one of [them] could have been called as a witness." Counsel's explanation is essentially an argument about prejudice: he did not file a motion to sup-

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booked, charged with murder, and placed in jail later that day, and that his co-defendant had already been charged—would not have believed that he was free to leave. Thus, there can be no doubt that Moore was in fact in custody when he was interrogated and confessed, *see Yarborough v. Alvarado*, 541 U.S. 652, 661-63 (2004); *United States v. Leyva*, 659 F.2d 118, 120 (9th Cir. 1981), and that a motion to suppress on this ground would also have been meritorious. In concluding that Moore was not in custody, counsel erroneously and unreasonably relied on Moore's post-invocation statements and subjective opinion in violation of the clearly established law of *Smith v. Illinois*, 469 U.S. 91, 97-98 (1984) (per curiam), and *Stansbury v. California*, 511 U.S. 318, 323 (1994).

press, he asserts, because doing so would have made no difference in light of Moore's confession to his brother and to Ziegler. For reasons we explain in the prejudice section of this opinion, *infra* Part III.B, we reject counsel's determination that suppressing Moore's formal, taped confession to the police was purposeless because of the two informal confessions.

[4] Counsel's decision not to file a motion to suppress was doubly erroneous: he both failed to recognize the clear merit of that motion on two grounds and failed, notwithstanding the clear teaching of *Fulminante*, to assess properly the damaging nature of the tape-recorded formal confession. Thus, because we squarely reject both reasons Moore's counsel offered to explain his decision not to file a motion to suppress, and because the confession unconstitutionally obtained by the police was so critical to the prosecution and so damaging to Moore, we hold that counsel's failure to file a motion to suppress the confession "fell below an objective standard of reasonableness" and, accordingly, constituted deficient performance. The state court's opposite conclusion was contrary to *Fulminante* and constituted an unreasonable application of *Strickland*.

The dissent argues that counsel's performance was not deficient because "[e]ven assuming the involuntariness of Moore's confession, counsel gave a detailed explanation why pursuing the plea was in Moore's strategic interest." Dis. op. at 9852. Whatever "strategic interests" the dissent might project onto counsel's thought process post hoc, counsel's "detailed explanation," put forward in his affidavit, makes

clear these were *not* the considerations upon which he based his decision not to file a motion to suppress. As explained above, counsel provided only two reasons for that decision, both of which were erroneous and objectively unreasonable.[12] At no time did counsel

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[12] Counsel's explanation of why he did not move to suppress Moore's confession is set forth in its entirety at paragraphs 3 and 4 of his affidavit. This explanation is as follows:

> 3. I did not file a Motion to Suppress. My reasons for doing this were two-fold. First of all, petitioner's interview with the police, which was taped and transcribed, a copy of the transcription is attached to this affidavit, makes it abundantly clear that Mr. Moore was not in custody. He never believed that he was in custody and admitted to me that he realized he was not in custody when he and his brothers and another friend voluntarily came to the police department to give the recorded statement. The law as I understood it then and now is exemplified by *State ex rel Juv. Dept. v. Loredo*, 125 Or App 390, and *State v. Smith*, 310 Or 1.
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> 4. In addition, however, Mr. Moore had previously given a full confession to his brother Raymond Moore and to a woman named Debbie Ziegler. Mr. Moore and I discussed the possibility of filing a Motion to Suppress and concluded that it would be unavailing, because in the first place, he knew he was not in custody at the time he gave the recorded interview and that the statement was voluntary, and in the second place, he had previously made a full confession to his brother and to Ms. Ziegler, either one of whom could have been called

suggest that he did not file the motion to suppress because he was concerned about the effect that doing so would have on Moore's plea deal or for any other "strategic" reason, and neither the state court nor the district court even hinted that counsel's failure to file the motion was based on any such consideration. Nor did the state itself so suggest at any time during this litigation and, of particular significance, it does not do so on this appeal. Only our dissenting colleague offers such a contention, and does so initially on this appeal and directly contrary to the facts in the record.

All the "strategic interests" the dissent says counsel might have relied on—namely, counsel's calculations regarding the charges Moore likely would have faced had he foregone the plea and his probability of success at trial—were factors counsel set forth in a wholly unrelated portion of his affidavit, calculations that related to a wholly different question. These "strategic interests" were offered by counsel not in explanation of his failure to file the motion to suppress, but solely in justification of his *advice to Moore to enter into the plea bargain*. Given counsel's specific explanation for his decision not to file a motion to suppress, that decision necessarily preceded and ultimately played a part in counsel's calculations regarding the plea offer. Those calculations were influenced by his decision on the motion, and are only as

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as a witness at any time to repeat his confession in full detail.

No other portion of counsel's affidavit offers any reason for his failure to file the motion. *See* Appendix B.

good as that decision.[13] Thus, we must consider whether counsel's decision not to file a motion to suppress Moore's confession met the "objective standard of reasonableness" required of competent counsel.[14]

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[13] In its effort to present counsel's suppression decision as contemporaneous with the plea negotiations, the dissent asserts that "[c]ounsel simply could not have moved to suppress a confession at any time before the plea" because "Moore was never indicted, but [rather] pled no contest to an information negotiated as part of the plea." Dis. op. at 9849-50. The fallacy of this reasoning is obvious: there is no doubt that had Moore's counsel decided to suppress the confession prior to entering plea negotiations he would have been able to do so. He need not have "*threaten[ed]* to file such a motion in the plea negotiations," *id.*; he simply could have waited for the clearly forthcoming charges to be filed, at which point he could have moved to suppress the confession. Instead, he decided, incorrectly, that a suppression motion would be unmeritorious, and, after making that erroneous conclusion, proceeded to plead his unindicted, uncharged client to felony murder. Counsel's determinations throughout the process were based on the erroneous premise that his client would be confronted with a recorded confession to the police that would assure a conviction regardless of all else. Such a course of conduct falls far short of "meticulous, informed representation." *id.* at 9849.

[14] For this reason, the dissent's invocation of *McMann v. Richardson*, 397 U.S. 759 (1970), is misplaced. Moore's challenge is not to counsel's plea advice, as was the case in *McMann*, but to counsel's failure to file a motion to suppress. This challenge to the failure to file a motion is a valid *Strickland* claim clearly recognized by the Supreme Court in *Kimmelman*. *See Van Tran v. Lindsey*, 212 F.3d

In quoting at length the remainder of Moore's counsel's affidavit—the passages that are unrelated to counsel's failure to file the suppression motion—the dissent attempts to obfuscate the issue by equating counsel's failure to file the motion with his advice to accept the proposed plea agreement. *See* dis. op. at 9847 (discussing the "strong and obvious strategic reasons to *take the plea and forego the suppression motion*"); dis. op. at 9848 ("[C]ounsel's advice to *forego the motion and take the plea* was based on numerous considerations other than these two factors."); dis. op.

1143, 1156 (9th Cir. 2000) ("The Supreme Court has held that counsel's failure to file a motion to suppress evidence can provide the basis for a claim of ineffectiveness." (citing *Kimmelman*)), *overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63 (2003). We have repeatedly recognized such *Kimmelman*-type *Strickland* claims ever since *Kimmelman* was decided more than twenty years ago, *see Ortiz-Sandoval*, 323 F.3d at 1170; *Van Tran*, 212 F.3d at 1156-57; *Lowry v. Lewis*, 21 F.3d 344, 345-47 (9th Cir. 1994); *United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991), and we have done so in cases in which the defendant pled rather than going to trial, *see Weaver v. Palmateer*, 455 F.3d 958, 972 (9th Cir. 2006); *Langford v. Day*, 110 F.3d 1380 (9th Cir. 1997), *amending on denial of reh'g and reh'g en banc* 102 F.3d 1551 (9th Cir. 1996). Here, as in *Langford* "the focus is not on an attorney's advice to plead guilty; it is on [the attorney's performance] . . . regarding possible defenses." *Langford*, 102 F.3d at 1386. As such, apart from the fact that *McMann*'s standard of attorney competence was the precursor to *Strickland*'s deficient performance prong, *see Strickland*, 466 U.S. at 687, *McMann* is simply inapposite to this case, which is about suppression, not plea advice.

at 9850 (discussing the "obvious strategic reasons . . . that counsel had *to advise Moore to take the plea*"). As counsel's affidavit makes plain, however, while the decision not to file the motion to suppress influenced counsel's separate advice to take the plea, the two decisions were distinct and the former was not influenced by the latter. *But see* dis. op. at 9849-50.

The deficiency in the dissent's reasoning becomes all the more apparent once we actually consult the record. The dissent argues that counsel's "strategic" decision to pursue a plea agreement was reasonable because "counsel feared severe consequences if his client went to trial." Dis. op. at 9846. Specifically, in the dissent's version of the record, the severe potential consequences included a possible "conviction of *aggravated* murder, [which] would have subjected Moore to the possibility of the death penalty or life imprisonment without the possibility of parole." *Id.* at 9847 (emphasis added). However, as is the case with much of the dissent, the "severe consequences" that Judge Bybee retrospectively injects into counsel's thought process were *not* the consequences that counsel actually contemplated. To the contrary, as counsel's affidavit makes clear, he "believed [that] if [Moore] went to trial he would be found guilty of assault, kidnapping, and murder (as was his codefendant, Roy Salyer, who chose trial as an option)." Appendix B at ¶ 17. Counsel feared that if Moore did not plead no contest, he would end up with the same sentence Salyer received after trial, but Moore and Salyer received *exactly the same* sentence: mandatory twentyfive year prison terms under Oregon's Measure 11. *See supra* n. 3; *see also Salyer v. Belleque*, 2005

WL 555403, at *1 (D. Or. Mar. 4, 2005). Therefore, the "severe consequences" that Moore's counsel feared, as opposed to those dreamed up by the dissent, amounted to precisely the same consequences that Moore actually faced under the "negotiated" plea agreement. Given this outcome, the dissent's reliance on the "reasonableness" of counsel's plea advice is doubly curious—not only does counsel's affidavit make clear that his decision regarding the motion to suppress was unrelated to his subsequent plea negotiations, but counsel hardly won a bargain that "was the best [he] could do under the circumstances," dis. op. at 9847, seeing as, by counsel's own admission, the plea bargain resulted in the same mandatory sentence that counsel thought would be the likely outcome of a full trial. In short, Moore's plea gained him nothing, just as counsel's failure to move to suppress the confessions was only to his client's detriment.

Knowles v. Mirzayance, 129 S.Ct. 1411 (2009), does not suggest a contrary result. *Knowles* holds that trial counsel need not pursue a defense that he "reasonably conclude[s] . . . [is] almost certain to lose." *Id.* at 1421. *Knowles* further explains that this is true even if the defendant has nothing to lose by presenting that defense. *Id.* at 1422. *Knowles* is entirely inapplicable here because Moore's counsel did not "reasonably conclude" that the motion to suppress was "almost certain to lose." Even the state has conceded that a motion to suppress Moore's confession would have succeeded. Further, Moore's counsel did not "reasonably" reach his erroneous conclusion, as he was entirely ignorant of the relevant law. Had Moore's counsel been reasonably informed about the

law, he would have learned that Moore was almost certainly in custody at the time of his confession, *see supra* note 11; that Moore's confession was almost certainly involuntary, *see supra* note 10; and that the admission of Moore's confession would, as *Fulminante* explained, be deeply prejudicial notwithstanding Raymond and Ziegler's potential testimony, *see infra* pages 9795-98. In short, Moore's counsel failed to suppress the confession because he was ignorant of clearly established law regarding custody, volition, and the prejudicial effect of a defendant's confession. The incorrect, uninformed, and unreasonable decision made by Moore's counsel is a far cry from the Supreme Court's recognition in *Knowles* that a reasonable decision by counsel as to the merits of a defense does not constitute ineffective assistance.[15]

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[15] Our dissenting colleague appears to believe that *Knowles* is relevant because, in *Knowles*, the Court requires no strategic justification for counsel's decision beside his reasonable conclusion that an insanity defense was certain to fail. Although a strategic reason may not be necessary for failing to make a motion that has no merit, it is certainly necessary when counsel fails to make a meritorious motion. As explained above, Moore's counsel did not forego the suppression motion for strategic reasons. Instead, he offered two reasons for failing to make the motion. One, he believed that the motion would fail. Two, he believed that suppression was worthless due to Raymond and Ziegler's potential testimony. Both reasons were based on counsel's ignorance of the law.

In crafting a strategic justification for trial counsel's failings, the dissent suggests that Moore "had a lot to lose" by rejecting the state's plea offer because "by going to trial

The dissent's attempt to elide the issues and obfuscate counsel's reasons for failing to file a critical motion is directly contrary to what counsel himself stated under oath. So that no reader will be misled as to exactly what counsel's reasons were—and were not—for failing to file a motion to suppress, we attach as Appendix B to the opinion a full and complete copy of counsel's affidavit. Even if the objective of not impairing plea negotiations might have been a reasonable strategy supporting some other counsel's decision not to file a motion to suppress in some other case, it was simply not a reason that influenced Moore's counsel or that his counsel considered as a basis for his decision.[16] Nor has the state ever ar-

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he risked losing a lenient plea agreement and getting a far more severe sentence." Dis. op. at 9842. The record belies this claim: Moore's co-defendant Salyer went to trial on the same charges that Moore's counsel believed Moore would face, and Salyer received a sentence identical to Moore's

[16] To be sure, we have held that a defense counsel's decision not to file a meritorious motion may constitute a reasonable strategic choice where counsel did so in order "not . . . to upend plea negotiations." *Weaver v. Palmateer*, 455 F.3d 958, 972 (9th Cir. 2006). That rule is of no relevance here, however. In such cases, the defendant had made clear in advance that he desired to plead rather than go to trial; thus, we emphasized, because the lawyer's conduct was *motivated* by his client's express wishes, his decision not to file a suppression motion so as to preserve the plea negotiations was a reasonable strategy. *Id.* (holding that counsel's failure to file a motion to exclude lineup identifications was reasonable "in light of [the defendant's]

gued, or the state court ever suggested, at any level, that counsel had any such strategic consideration in mind. This is simply another argument that our dissenting colleague has for the first time conjured up on appeal. We may not as appellate judges manufacture such arguments from scratch, especially where, as here, the facts in the record are directly contrary to the theory we are seeking to create on behalf of one of the parties. *See Alcala v. Woodford*, 334 F.3d 862, 871 (9th Cir. 2003) ("We will not assume facts not in the record in order to manufacture a reasonable strategic decision for [the defendant's] trial counsel."). The dissent's suggestion that counsel's decision not to file a motion was motivated by strategic considerations

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desire to plead guilty and avoid multiple public trials"); *Langford*, 110 F.3d at 1387 (holding that counsel's failure to pursue suppression of a confession was not deficient performance where the defendant had "insiste[d] . . . that he wanted no motions to suppress or other types of delay to interfere with his intended plea of guilty"); *see also Stankewitz v. Woodford*, 365 F.3d 706, 720 n.7 (9th Cir. 2004) ("An attorney's performance is not deficient where[ ] . . . it reflects a reasonable strategic choice that aligns with his client's wishes."). In this case, there is no suggestion, let alone any evidence, that Moore expressed a desire to plead guilty and avoid trial, or to forego the filing of his meritorious suppression motion, prior to counsel's decision not to file such a motion, nor did counsel ever suggest that his reason for not filing the motion was that it would have jeopardized or adversely affected plea negotiations. To the contrary, counsel's affidavit makes clear that his reasons for not filing the motion had nothing to do with the prospective plea negotiations. *See infra* Appendix B at ¶¶ 3-4.

concerning the plea negotiations "resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of [his] deliberations prior to" deciding against filing the motion. *Wiggins*, 539 U.S. at 526-27.

[5] Where the issue is whether counsel's performance was ineffective, we must decide that question based on what counsel's reasons for his decisions actually were, not on the basis of what reasons he could have had for those decisions. Thus, just as we may not second-guess a lawyer's reasonable tactical or strategic decisions, *Strickland*, 466 U.S. at 689, we may not deem unreasonable actions to have been "the result of reasonable professional judgment," *id.* at 690, by grounding them in considerations that were not, in fact, the lawyer's reasons for acting or failing to act. *See Kimmelman*, 477 U.S. at 385 ("The trial record in this case clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence."); *Tomlin v. Myers*, 30 F.3d 1235, 1239 (9th Cir. 1994) (rejecting counsel's justification for his failure to move to suppress unconstitutional lineup identification evidence—that he did not believe it would be excluded—where counsel "did not indicate that that was the basis on which he chose not to object"). Here, as in *Kimmelman* and *Tomlin*, the record makes clear that counsel failed to file a motion to suppress not for strategic reasons but because of his ineffective performance of his duties. As counsel himself explained, his failure to file a motion was based

solely on his assessment of the motion's likelihood of success and his judgment that failing to suppress Moore's formal, taped confession to the police would be harmless in light of the two informal confessions that Moore allegedly had made to laymen. Because that assessment was grossly erroneous and clearly "fell below an objective standard of reasonableness," we hold that Moore's counsel's performance was constitutionally deficient under *Strickland*.

B. Prejudice

[6] It has long been clear that *Strickland*'s prejudice prong requires no more than a "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *id.* (holding that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome"). In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Supreme Court confirmed that *Strickland*'s prejudice standard applies in the plea context; it held that prejudice in that context turns on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 59. "In other words," the Court wrote, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

[7] We are confronted here with a very clear and specific argument by the state as to why the failure of Moore's counsel to move to suppress the taped confession Moore made while in custody in the police sta-

tion was not prejudicial. The argument is not, as our dissenting colleague wishes it were, that the police had so much evidence against Moore that Moore's formal confession was unlikely to affect the result. Had that been the state's contention, we would have had very different briefs, very different oral arguments, and a very different majority opinion, although not a different result. It is not the function of appellate judges, however, to decide cases that the parties have not presented to them. Here, the state's sole argument as to prejudice is straightforward and succinct: '[P]etitioner previously had confessed 'the whole story' that he told police to his brother and told another friend, Debbie Ziegler, 'what had happened.' Either of those people could have been called as witnesses to repeat the confession . . . . In light of this, petitioner failed to show . . . that he was prejudiced by counsel's decisions." State's Br. at 18. The state's argument mirrors Moore's counsel's explanation for why he did not file the motion, *see* Counsel's Affidavit at 2 ¶4 (concluding that a motion to suppress "would be unavailing" because Moore "had previously made a full confession to his brother and to Ms. Ziegler, either one of whom could have been called as a witness . . . to repeat his confession in full detail"), as well as the state court's conclusion as to prejudice, *see* State Court decision at 6 ¶8 ("Both Raymond Moore and the friend could have been called as witnesses to repeat petitioner's confession. A motion to suppress would have been fruitless.") (citing Counsel's Affidavit) (citation omitted). Critically, at no point does the state argue—nor did the state court hold—that counsel's failure to file the motion was not prejudicial be-

cause the state had other evidence in its possession that would have caused Moore to accept the plea rather than go to trial. The state's argument and the state court's decision are limited exclusively to the contention that Moore had confessed to two lay persons and for *that* reason the exclusion of his formal confession to the police would have made no difference to Moore's decision to plead. As a result, our analysis is limited to the specific question whether the existence of an informal "confession" to two lay witnesses makes counsel's failure to move to suppress Moore's formal, taped confession to the police non-prejudicial.[17]

The state court found, as a matter of fact, that because Moore "had previously confessed his participation in the crime to his brother . . . and another friend," both of these individuals "could have been called as witnesses to repeat petitioner's confession." It then concluded, as a matter of law, that because "[b]oth Raymond Moore and the friend could have been called as witnesses to repeat petitioner's confession . . . [a] motion to suppress," even if successful,

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[17] Were we to consider the arguments regarding prejudice created *ex cathedra* on appeal by the dissent, we would in all likelihood reject them. So as not to leave the dissent's extensive presentation of the case it has created on behalf of the state *wholly* unanswered, we have commented in a summary fashion in Appendix A, *infra*. We note, here, however, that the legal obstacles Judge Bybee's enormously creative argument faces are insurmountable for some of the reasons we have set forth herein, as well as for the reasons set forth in that Appendix.

"would have been fruitless."[18] Assessing the state court's decision under AEDPA, we conclude that its prejudice determination constituted "an unreasonable application of[ ] clearly established Federal law" under 28 U.S.C. § 2254(d)(1).

Even granting the factual assumption underlying the state court's prejudice determination—*i.e.*, that Raymond and Ziegler would have testified to a version of Moore's informal confession—its determination that counsel's failure to suppress the formal taped confession was not prejudicial because Moore had previously told his relative and a relative's girlfriend about his participation in the killing of the victim was contrary to clearly established Supreme Court law. Indeed, the Supreme Court squarely rejected a markedly similar argument in *Arizona v. Fulminante*, 499 U.S. 279, a case that is, *a fortiori*, controlling here.[19]

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[18] The district court echoed the state court, adding only, on its own initiative, that co-defendant "Salyer's demonstrated willingness to cooperate with the police" also prevented any error by Moore's counsel from prejudicing his defense.

[19] The dissent finds it significant that petitioner does not cite *Arizona v. Fulminante* in his brief, *see* dis. op. at 9837-38, 9860 n.15, 9864, equating our reliance on this Supreme Court precedent with the dissent's effort to judicially manufacture a new record on appeal. However, it is clear that the petitioner never waived the issue of prejudice or the argument that Moore's confession was prejudicial despite the existence of the other "confessions." To the contrary, this issue was central to the litigation below.

[8] In *Fulminante*, the defendant confessed, while in prison, to a paid informant who offered protection from "tough treatment" in exchange for the confession; he also confessed to the informant's wife following his release from prison. 499 U.S. at 283-84 (internal quotation marks omitted). Fulminante claimed that the confession to the informant was coerced and that its admission at trial violated his rights under the Fifth and Fourteenth Amendments. *Id.* at 284. The state supreme court, not unlike the state court here, found that the admission of the defendant's coerced confession was harmless because an "admissible second confession . . . rendered the first confession . . . cumulative." *Id.* at 296. The state court in *Fulminante* concluded that "due to the overwhelming evidence adduced from the second confession, if there had not been a first confession, the jury would still have had the same basic evidence to convict." *Id.* at 297 (quoting *State v. Fulminante*, 778 P.2d 602, 611 (Ariz. 1988)) (internal quotation marks omitted). The Supreme Court unequivocally rejected this argument. The Court held that because "the two confessions re-

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Where a party has "raised the issue" and the opposing party has had an opportunity to offer arguments in response, the Court of Appeals is not prohibited from relying on Supreme Court precedent simply because a party failed to cite that particular "legal authority to support their contention." *Lake v. Lake*, 817 F.2d 1416, 1424 (9th Cir. 1987); *cf. Puerta v. United States*, 121 F.3d 1338, 1341-42 (9th Cir. 1997) ("An argument is typically elaborated more articulately, with more extensive authorities, on appeal . . . and there is nothing wrong with that.").

inforced and corroborated each other . . . one confession was not merely cumulative of the other," *id.* at 299, and therefore concluded that the error was not harmless, *id.* at 297. *Fulminante* stands for the proposition that the admission of an additional confession ordinarily reinforces and corroborates the others and is therefore prejudicial.[20]

[9] Here, too, the formal confession to the police would reinforce and corroborate the informal confessions. But, here, the prejudice is far greater than with the type of confessions involved in *Fulminante*. Unlike in *Fulminante*, the unconstitutional evidence here did not involve simply a second recitation by a second lay witness of an account of an informal confession. Rather, here the evidence that counsel should have sought to exclude was a *formal taped confession*

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[20] Contrary to the dissent's contention, we do not "adopt a per se rule that the improper admission of a confession is prejudicial." Dis. op. at 9865. We recognize that *Fulminante* held that the erroneous admission of a confession is *subject* to harmless error review; it did not, however, hold that such an error *is ordinarily harmless*. To the contrary, the Court emphasized that "[i]n the case of a coerced confession . . . the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise *extreme caution* before determining that the admission of the confession at trial was harmless." *Fulminante*, 499 U.S. at 296 (emphasis added). Here, for reasons we explain at length in the text, such an exercise of caution compels the conclusion that the admission of Moore's coerced, uncounseled, formal confession would have been highly prejudicial.

in which Moore himself described in detail, in his own words and his own voice, his participation in a killing in response to detailed questioning by trained investigators in the police station. Such a formal confession would, without question, be far more persuasive to a jury than Moore's statements to two lay witnesses—statements that Moore's brother Raymond and his half-brother Lonnie's girlfriend might or might not have been willing to recount, but that would in any event have lacked the flavor, details, specificity, and completeness of the taped confession. There can be little doubt that a taped recording of a defendant's confession taken with all the requisite formalities by police officers and played to a jury that hears the defendant's confession in the defendant's own words from his own lips (or even from a reading of a transcript of his confession) is in no way comparable in its impact on the jury, and is indeed far more inculpatory in substance and effect, than a recitation by a layperson of the defendant's informal and unrecorded account of the incident[21] —in this case, a reci-

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[21] The dissent's argument that the facts of this case bear a closer resemblance to the facts of *Milton v. Wainwright*, 407 U.S. 371 (1972), than to those of *Fulminante* is simply not correct. *See* dis. op. at 9869 n.22. In *Milton*, as the dissent notes, the petitioner had already made three full confessions, which were held to be admissible. *Milton*, 407 U.S. at 373-74, 376-77. The petitioner challenged the admission of a fourth confession, made to an undercover officer posing as an incarcerated murder suspect in petitioner's cell. *Id.* at 375. In a case in which the petitioner has already made three confessions—one that was recorded and two that were in writing and signed by the pe-

tation by witnesses sympathetic to the defendant who would undoubtedly be reluctant to do unnecessary harm to his case and whose testimony, to the extent that it might be adverse, would be subject to rigorous cross-examination by defense counsel whose efforts at impeachment they would be inclined to support.[22]

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titioner—it is relatively clear that a fourth confession made orally to another person will not be prejudicial. In the present case, however, the challenged confession was the only full and formal confession, the only confession that was memorialized in any manner, let alone in the form of a taped recording; further, as discussed *infra*, it is unclear whether the two prior informal confessions would have been adduced at trial or how effective they would have been. Moore's taped confession would have been the only full account of the events relating to the actual kidnapping and shooting, as well as the only totally credible account, not subject to challenge on cross-examination. To treat it as simply corroborative would be grossly disingenuous.

[22] In applying *Strickland*'s prejudice prong, we also note that this court has refused to hold non-prejudicial the wrongful admission of a critical piece of evidence even when other, substantially similar statements would have been admissible. *See, e.g.*, *Bockting v. Bayer*, 408 F.3d 1127, 1127 (9th Cir. 2005) ("Even if [the six-year-old alleged sexual abuse victim's] statement to the mother was, for argument's sake, considered admissible, the detective's description of Autumn's interview was *so significant as corroborating evidence that its admission had a substantial and injurious effect* or influence in determining the jury's verdict." (emphasis added)), amending on denial of reh'g 399 F.3d 1010, 1022, rev'd on other grounds sub nom. *Whorton v. Bockting*, 127 S. Ct. 1173 (2007).

Admission of Moore's formal, tape-recorded confession would certainly have "reinforced and corroborated" the informal accounts reported by two lay witnesses. *Fulminante*, 499 U.S. at 299. The state court's finding that a motion to suppress a recorded confession to the police would have been "fruitless" due to the fact that Raymond or Ziegler "could have been called as witnesses to repeat [Moore's] confession" was without question contrary to clearly established federal law as set forth in *Fulminante*[23]

The probability that Moore would not have pled to a felony murder charge with a mandatory twenty-five-year sentence had his counsel filed a motion to suppress the taped confession is more than "sufficient to undermine confidence in the outcome" under *Strickland*. Without Moore's formal, taped confession, the state's case would have been far weaker. As the

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[23] *See Stapleton v. Wolfe*, 288 F.3d 863, 868 (6th Cir. 2002) (holding under AEDPA that a finding of lack of prejudice under analogous circumstances was contrary to *Fulminante*). Unlike the instant case, *Stapleton* involved multiple accomplice statements rather than more than one confession. However, relying on *Fulminante*, the Sixth Circuit held that because "Stapleton's jury could have believed that [one accomplice's] statements and [the other accomplice's] taped statements 'reinforced and corroborated each other,' " the admission of the second accomplice's taped statements, which violated Stapleton's Confrontation Clause rights, was not harmless error. *Id.* (quoting *Fulminante*, 499 U.S. at 299). The *Stapleton* court also held that the state court had "reached a decision contrary to clearly established federal law"—namely, *Fulminante*. *Id.*

Supreme Court held in *Fulminante*, "[a] confession is like no other evidence." 499 U.S. at 296. The *Fulminante* Court emphasized the weight of a defendant's confession: A "defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct." *Id.* (quoting *Bruton*, 391 U.S. at 139-40 (White, J., dissenting)) (omission and alteration in original); *see also Taylor v. Maddox*, 366 F.3d 992, 1017 (9th Cir. 2004) ("[W]e are mindful of the Supreme Court's admonition as to the devastating power of confessions." (citing *Fulminante*, 499 U.S. at 296)). When that confession is recorded on tape and played to a jury, which hears it in the defendant's own voice, or when the defendant's own words are transcribed and read directly to the jury, the confession is of course far more harmful than that recounted by a lay witness —a witness who is subject to cross-examination on the basis of the accuracy of his recollection or even on the basis of his veracity, bias, or self-interest—who simply tells the jury what the defendant purportedly said in an unrecorded informal discussion.

It is likely that, without the benefit of Moore's formal, tape-recorded confession to the police officers, the state would not have been able to secure a plea on the basis of the informal confessions. Even assuming that the prosecution was confident that Raymond or Ziegler would have testified at a trial, it is far from clear what those witnesses would have said or to what extent their testimony would have been persua-

sive to a jury, although it is certain that their second-hand reports would not have been nearly as damaging as Moore's own taped confession. Critically, the state court made no findings as to the contents of what Moore had told Raymond or Ziegler or what details they might have been able to recount at trial. Thus, the record falls far short of establishing that the potential testimony of Raymond and Ziegler would have been sufficient to cause Moore to accept so harsh a plea agreement—especially because Raymond would likely have been a hostile witness and there is little evidence that Ziegler could have contributed anything.[24] In addition, as noted already, the

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[24] In its quest to construct a record supportive of its reasoning, the dissent claims that "[w]e do not need to fret much about what Raymond Moore would have testified had he been called at trial . . . because the record contains Raymond's testimony at the state court post-conviction evidentiary hearing." Dis. op. at 9853. However, at the time of the plea neither the state nor defense counsel had interviewed Raymond in order to determine what he knew about the events. Moreover, Raymond offered the testimony that the dissent quotes on his brother's *behalf* in order to help win his freedom; there are significant reasons to believe that, in the context of a trial, Raymond would not have been willing to help convict his brother. Raymond was not only Moore's brother, but also served as an advocate for Moore and his co-defendant before and after the interrogation. Indeed, at the post-conviction hearing, Raymond revealed that he felt just as betrayed by the police and District Attorney as did Moore when they failed to "go to bat" for him. Furthermore, even if the state had subpoenaed Raymond to testify, knowing him to be a hos-

plea agreement accepted by Moore did nothing to reduce his sentence, as his co-defendant received an identical mandatory minimum sentence after going to trial. Accordingly, exercising "extreme caution," as

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tile witness, it is unlikely that it would have been able to elicit much of the information it desired from him.

As for Ziegler, there is *no* evidence regarding precisely what Moore told her about the crime, and it seems unlikely from the record that he told her much. The interrogation transcript shows only the following question and answer: "Debbie, since you're here and you've listened to their story, when did you first find out about this?" "Today." Ziegler also stated, "I didn't know [about Rogers's death] until we'd read the paper and I still didn't know the actual thing." There is no further record of what Ziegler knew.

The dissent asserts that the state court explicitly found that Moore made a full confession to Ziegler because it stated at one point that "[t]he Court believes trial counsel's affidavit" and because that affidavit asserted that a "full confession" had been made. Read in context, however, the state court declared only that it believed the affidavit as to one particular assertion it contained—that Moore's counsel had reviewed Moore's statement —not that it believed every single statement contained in the affidavit, including those that it did not discuss until three pages later when for the first time it mentioned Moore's alleged confession to Ziegler. In any case, the state court entirely ignored the "relevant" and "highly probative" conflicting evidence consisting of Ziegler's statements at the interrogation, rendering its factfinding process "defective" and unworthy of our deference under AEDPA. *See Taylor*, 366 F.3d at 1000-01.

Fulminante requires us to do, *Fulminante*, 499 U.S. at 296, we cannot conclude that counsel's failure to move to suppress Moore's formal, taped confession was harmless.

The dissent criticizes our application of *Fulminante*, arguing that it actually "supports the exact opposite conclusion" from our holding. Dis. op. at 9865. Specifically, the dissent contends that *Fulminante*'s description of the weight of confessions applies to Moore's informal confessions to Raymond and Ziegler as well and that, consequently, *Fulminante* supports the conclusion that Moore's formal, taped confession was not prejudicial because the two lay confessions also carried unique weight. *Id.* In advancing this argument, the dissent entirely misses the point of *Fulminante*. In that case, the Supreme Court held that the admission of the coerced confession was prejudicial *notwithstanding the availability of another confession to a lay witness*. Under the dissent's logic, the other confession Fulminante made to a lay witness would have rendered his coerced confession nonprejudicial, and his case would have come out the opposite way: his conviction would have been affirmed, not reversed. But that, of course, was *not* the outcome of *Fulminante*.

Indeed, our application of *Fulminante* is fully consistent with this court's recent en banc decision in *Anderson v. Terhune*, 516 F.3d 781 (9th Cir. 2008) (en banc), an AEDPA case involving a confession obtained in violation of the defendant's Fifth Amendment right to silence. In *Anderson*, we held that the state court had unreasonably applied the clearly es-

tablished law of *Miranda v. Arizona*, 384 U.S. 436 (1966), in concluding that the police's continued interrogation, which resulted in the defendant's confession, after the defendant had stated, "I plead the Fifth," did not violate the Fifth Amendment. *Anderson*, 516 F.3d at 790-91. In determining that the *Miranda* violation was not harmless, we did not even consider the other evidence the state had presented to tie the defendant to the crime, or whether the confession would have repeated such evidence. Rather, relying on *Fulminante*'s guidance that a "defendant's own confession is probably the most . . . damaging evidence that can be admitted against him," *id.* at 792 (quoting *Fulminante*, 499 U.S. at 296) (internal quotation marks omitted), we concluded that the "prejudice from Anderson's confession cannot be soft pedaled" because the "confession was central to the conviction," *id.*

[10] As in *Anderson*, Moore's formal, taped confession was central to the state's ability to secure a plea. The count to which Moore pled carried an extremely harsh mandatory minimum sentence as a result of the recent passage of a state ballot measure. There is at least a reasonable probability that, had his confession to the police been suppressed, Moore would have insisted on going to trial rather than pleading to the offense to which he did, an offense that carried with it so severe a mandatory sentence—the same 25 year Measure 11 sentence that his co-defendant Salyer received after going to trial.[25] In light of these consid-

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[25] The dissent misses the point when it observes that "Moore obtained the lowest sentence available under Ore-

erations, the only reasonable conclusion is that Moore has established *Strickland* prejudice.[26]

* * *

[11] Our task on habeas is to examine the state court's decision under the standards established by AEDPA. The state court held that counsel's failure to move to suppress Moore's taped confession was not prejudicial for the sole reason that he had also confessed to two lay witnesses. In reviewing that decision, we have, following the law, based our analysis on the decision itself and the arguments made by the state on appeal. The state argued before the district court and this court, consistent with its argument to the state court, and consistent with the state court's decision, that Moore's counsel's performance was not prejudicial for one reason and one reason only: Moore

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gon law for felony murder." Dis. op. at 9836-37. Without Moore's confession and the other evidence it produced, Moore likely would not have been convicted of, or even charged with felony murder, but rather would have faced some lesser charge.

[26] After the involuntary confession was suppressed, the state might well have offered a more generous plea bargain. Moore need not show that he would have rejected any and all plea bargains the state might have offered. Under *Hill*, it is enough that there is a reasonable probability that he would have chosen trial over the plea bargain he was actually offered. Accordingly, we need not consider whether Moore could also establish prejudice by showing a reasonable probability that he would have obtained a better plea bargain had his attorney moved to suppress his confession.

had confessed to Raymond and Ziegler, who could have been called as witnesses, thereby rendering the suppression of the confession of no practical significance. As discussed *supra*, that argument is wholly lacking in merit and the state court's conclusion that Moore was not prejudiced by counsel's failure to file a motion to suppress is objectively unreasonable under clearly established Supreme Court law. *Fulminante* permits no such construction of the law, and such a misconstruction is unreasonable under any standard.

To reach the opposite conclusion, the dissent once again develops its own set of facts and its own arguments—arguments that were never conceived of by the state nor suggested before the state court, the district court, or this court, a set of facts and arguments to which the petitioner has never had an opportunity to respond. The case now presented on the state's behalf for the first time has been created in its entirety by our extremely able, talented, and experienced colleague; it is based on the testimony of witnesses and evidence never mentioned or relied upon by the state in its arguments regarding prejudice. Further, the dissent creates and relies upon testimony that it assumes inevitably would have supported the state's case, without any evidence in the record as to the substance or availability of such testimony, or, even more important, its *admissibility*.

No court in this case has undertaken the formidable factual inquiry necessary to determine the admissibility—and in some instances, substance—of the evidence upon which the dissent relies. The record discloses little about how and when most of this evi-

dence became known to the state, making it impossible for us to determine whether that evidence is, as seems likely, a "fruit of the poisonous tree"—a product of Moore's confession. To make this determination would require us to find a multitude of facts for the first time on appeal, a function that we are neither equipped nor permitted to perform. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 497 (1991) (observing that a federal appellate court "lack[s] the factfinding and record-developing capabilities of a federal district court").

Even apart from concerns about inappropriate appellate factfinding, we simply decline to base our decision on arguments and theories that the state has never offered, and which it has therefore forfeited. It would work great prejudice to the petitioner were we to affirm the denial of his habeas petition on the basis of such speculative arguments and assertions offered for the first time by a member of this court—arguments and assertions to which Moore has had no occasion, opportunity, or reason to respond. Without any indication from the state as to what evidence it may have possessed and why that evidence may have rendered counsel's failure to suppress the confession harmless, it is simply impossible for a petitioner to respond to the state's "evidence" or "arguments."

Our prior decisions disapprove of such practice. Indeed, under our precedent, the state has *doubly* forfeited the factbound alternative theories of prejudice that our dissenting colleague creates and advances on its behalf. Not only did the state forfeit any such contentions by not raising them on appeal, but it first

forfeited these theories in federal court by failing to raise them in the district court. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996) ("The decision to consider an issue not raised below is discretionary, and such an issue should not be decided if it would prejudice the other party."). The Supreme Court has explained that this forfeiture rule "is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide" and that "it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). The forfeiture rule (sometimes erroneously called the waiver rule) applies equally to arguments, factual assertions, and legal theories that were not urged below. *See Gieg v. DDR, Inc.*, 407 F.3d 1038, 1046 n.10 (9th Cir. 2005) (holding that appellees had waived argument not raised below); *Int'l Union of Bricklayers & Allied Craftsman Local Union v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404-06 (9th Cir. 1985) (finding waiver of factual assertions not raised in the district court); *see also A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 337-39 (9th Cir. 1996) (declining to consider legal theory that would require further development of the factual record).

[12] In this case, the state's failure to raise below the argument that counsel's failure to move to sup-

press the taped confession was harmless for reasons other than the existence of the two informal confessions precludes us from considering that argument on this appeal. Moore has had no opportunity to introduce evidence on the crucial question of which parts of the case the dissent now creates for the state are based on "fruits of the poisonous tree." Nor has he had any opportunity to challenge any contention the state might advance that such evidence was obtained independent of any connection with the confession, or to examine any prosecution witness who might testify to that effect. Finally, as some of the evidence is not even in the record, he has not had the opportunity to challenge the dissent's assertion that such evidence actually exists.

The state forfeited these arguments a second time by failing to raise them before this court. In *Stuard v. Stewart*, 401 F.3d 1064 (9th Cir. 2005), we squarely rejected the notion that this court could create arguments for the state that it did not raise on appeal. *See id.* at 1067 (holding in an AEDPA case that "we are not going to construct an argument for the state sua sponte, depriving [the defendant's] counsel of a fair chance to respond to it"). We ordinarily will not consider arguments not raised by a party in its opening brief, especially where doing so would prejudice the opposing side. *See United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992); *see also* Fed. R. App. P. 28(a)(9), (b). "We apply that rule with some vigor against criminal defendants; we should be no less vigorous in applying it against the government." *United States v. Ziegler*, 497 F.3d 890, 901 (9th Cir. 2007) (Kozinski, J., dissenting from denial of rehearing en

banc) (citation omitted). The state court's failure to recognize that Moore's confession was obtained unlawfully, along with its and the state's exclusive reliance on the other "confessions" to establish prejudice, resulted in the court's not making *any* determination as to whether all, or what parts of, the evidence on which the dissent now relies was obtained as a result of the unlawful confession and was thus inadmissible in evidence. *See* Appendix A, *infra*, at 9811-12. Nor, for similar reasons, as we have noted, did the district court undertake any such inquiry. Although it seems likely that the evidence on which the dissent relies (to the extent that it exists at all) was principally obtained as a result of Moore's confession,[27] we cannot determine those facts here. Because no factual determination has ever been made as to the "fruits of the poisonous tree" and because the state has repeatedly failed to offer, and has thereby forfeited, any argument that some unproven potential evidentiary case as a whole might have rendered counsel's deficient performance non-prejudicial, we cannot and do not here consider the dissent's extensive evidentiary analysis. Rather, we are left only

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[27] For example, the first two dramatic sentences of the dissent, in which Judge Bybee purports to describe the facts of the case, parrot the statement provided by Moore's counsel in his effort to defend himself against charges of incompetence. It appears that Moore's counsel inferred these facts from statements his client had made and from Moore's half-brother's confession, both of which were inadmissible. It is likely for this reason that the state did not offer any of the arguments that Judge Bybee now makes.

with determining whether the difference between the weight of Moore's statements to his brother and his half brother's girlfriend and his formal taped confession to the police is such that the exclusion of the latter undermines our confidence that Moore would have entered into so harsh a plea agreement. Considering only the arguments that are properly before us, we hold that Moore has established *Strickland* prejudice.

Conclusion

Moore's counsel inexplicably failed to file a motion to suppress—a motion that could easily have been based on either of two grounds, each of which was meritorious and each of which would in all likelihood have resulted in the suppression of his confession and its fruits. The state does not contest the finding that Moore would have prevailed on one of them—that his confession was involuntary. The reasons offered by counsel for his conduct were both limited and unmeritorious (and bear no resemblance to the reasons suggested by the dissent). His inexcusable failure to move to exclude the confession afforded the state the opportunity to prosecute Moore on the basis of the most damaging inculpatory evidence that can be introduced against a defendant, and thereby to exact a no-contest plea to the egregious offense of felony murder with a mandatory twenty-five-year sentence. We conclude that Moore was prejudiced by his counsel's failure to file the suppression motion and that, because counsel's performance fell below an objective standard of reasonableness, he received ineffective assistance of counsel under *Strickland*. A contrary ruling would necessarily constitute an unreasonable

application of clearly established Supreme Court law. Neither *Fulminante* nor *Strickland* is susceptible of an objectively reasonable interpretation, even though erroneous, that would support a determination that counsel's performance in this case was competent or that Moore suffered no prejudice as a result of his representation.

Ignoring Moore's request, the state court failed to consider whether the confession was involuntary on the ground that his will was overborne by improper promises of leniency. The district court found, however, that Moore's confession was made involuntarily. Because the state does not challenge that determination on appeal, it has conceded that a motion to suppress on involuntariness grounds would have been meritorious. Despite the merit of such a motion, Moore's counsel failed to move to suppress what was "probably the most probative and damaging evidence that [could] be admitted against him," *Fulminante*, 499 U.S. at 296 (quoting *Bruton*, 391 U.S. at 139 (White, J., dissenting)). He did not fail to make the motion for any strategic reasons but simply because he understood that Moore had told two other persons what had happened on the day in question and concluded that as a result the admission of his formal taped confession to the police would be harmless. Given that the failure was in fact highly prejudicial, counsel's conduct fell below an objective standard of reasonableness and therefore was "deficient" under *Strickland*. A contrary decision would constitute an objectively unreasonable application of clearly established Supreme Court law.

REVERSED AND REMANDED.

APPENDIX A

In this Appendix we will discuss the facts and theories that our dissenting colleague has created and advanced on behalf of the state—facts and theories not relied on by the state court, not suggested by the state in the district court, and not argued to this court by either party—facts and theories advanced for the first time by an appellate judge, in contravention of all the rules of appellate procedure. Here, we will explain why, even had the state not forfeited the alternative theories of prejudice the dissent creates for it, we would reject them on the merits.

With respect to Moore's co-defendant, Salyer, although the district court believed that he "apparently provided detectives with the details of the crime when he took them to the location where the shooting occurred," there is no evidence in the record as to what information he conveyed to them. Salyer never gave a sworn statement, never testified, and was never cross-examined. There is simply no way of knowing precisely what Salyer's testimony might have been, especially under the stress of cross examination. More important, as we explained in footnote 4 of the opinion, it is almost certain that Salyer would not have testified against Moore in any event but would have taken the Fifth Amendment instead, as he too was facing trial for his involvement in Rogers's death.[29] In fact, Salyer was ultimately tried and his

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[29] Of course, without the ability to put Salyer on the stand, the state would not have been able to introduce any statements he might have previously made, as doing so would have violated Moore's Sixth Amendment right to

appellate and postconviction proceedings did not end until long after the date on which Moore would have gone to trial had he not pled. *See Salyer v. Belleque*, 2005 WL 555403 (D. Or. Mar. 4, 2005) (denying Salyer's federal habeas petition).

The dissent argues that the state's felony murder case was "airtight" even without Moore's confession to the police, his alleged confession to Raymond and Ziegler, and the testimony of his co-defendants. Dis. op. at 9855, 9858. This is simply not so. This dissent goes on at length about all of the damning facts that are "undisputed" or "indisputable" in this case. Many of these "undisputed" facts, however, appear to be drawn by the dissent from the factual basis the state offered at Moore's plea colloquy and sentencing. *See, e.g.*, dis. op. at 9857 ("[T]he car's license plates had been covered over with duct tape."). These facts, of course, became "undisputed" only after Moore had decided to plead no contest. The fact that Moore did not object to factual assertions made by the state's attorney at his plea colloquy, after he had decided not to contest the charges (because doing so not only would have served no purpose but would also have been hopeless with his formal confession in the record), does not mean that, without Moore's illegal confession and its fruits, the state would have been able to prove the assertions beyond a reasonable doubt at trial.

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cross examine adverse witnesses. *See Bruton v. United States*, 391 U.S. 123, 127-28 (1968).

More important, nearly all of the evidence the dissent discusses would have been inadmissible at trial because it derived either directly or indirectly from Moore and Woolhiser's involuntary confessions. In particular, the authorities learned about the existence and identities of the witnesses at Woolhiser and Ziegler's residence—who, the dissent insinuates, could have been called to testify to Salyer's "ranting and raving" and the trio's plan to scare Rogers—as a result of the illegal confessions. It is also from the confessions that the police learned about the "multiple witnesses" who allegedly saw Moore, Salyer, and Woolhiser arrive at and later return to Rogers's residence.[30] Dis. op. at 9858. The police found the gun, too, because Woolhiser agreed during the unlawful interrogation to show the police "exactly" where it was located. And while the record contains no explanation regarding how the police located the car, which contained additional physical evidence, in California, it seems highly likely that they did so using information supplied by the defendants after they had "let the cat out of the bag" by giving their involuntary confessions.

Had Moore's counsel filed a motion to suppress on the ground the state concedes is meritorious, and had that motion succeeded, which is highly probable, all of this evidence would likely have been excluded as "fruits of the poisonous tree." *See Wong Sun v. United*

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[30] The day before the interrogation at issue, Moore told police that "some guy" was present outside Rogers's motor home, but never commented on the presence or identities of any other witnesses.

States, 371 U.S. 471 (1963). The fruits of involuntary confessions—including those that are extracted with promises of leniency—may not be admitted at trial. *See Kastigar v. United States*, 406 U.S. 441, 453 (1972) ("We hold that . . . immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination . . . . Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords [the protection required by the Fifth Amendment]. It prohibits prosecutorial authorities from using the compelled testimony in *any* respect . . . ."); *see also United States v. Patane*, 542 U.S. 630, 644 (2004) (plurality opinion) ("[T]he Court requires the exclusion of the physical fruit of actually coerced statements . . . ."); *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1048 (9th Cir. 1990). Thus, a successful motion to suppress would have triggered the "fruits of the poisonous tree" doctrine, rendering inadmissible all evidence obtained as a result of Moore's confession.

Nor would Woolhiser's confession—which was obtained during the same coercive interrogation as Moore's—or its fruits be admissible against Moore. *See Douglas v. Woodford*, 316 F.3d 1079, 1092 (9th Cir. 2003) ("[I]llegally obtained confessions may be less reliable than voluntary ones, and thus using a coerced confession at another's trial can violate due process." (citing *Clanton v. Cooper*, 129 F.3d 1147, 1157-58 (10th Cir. 1997) ("[A] person may challenge the government's use against him or her of a coerced confession given by another person."))); *see also Clanton*, 129 F.3d at 1158 (collecting similar cases from

the First, Fifth, Sixth, and Seventh Circuits). Furthermore, there is no evidence in the record, nor any assertion by the prosecution, that the physical and eyewitness evidence on which the dissent relies was obtained through a source independent from the illegal confessions or that the connection between the confessions and the evidence was "so attenuated as to dissipate the taint." *See Wong Sun*, 371 U.S. at 487 (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)) (internal quotation mark omitted).[31]

The dissent's suggestion that much of the evidence on which it relies to construct the state's hypothetical and "airtight" case was based "solely on statements made by Moore, the admissibility of which has never been questioned" is unsupported by the record. *See* dis. op. at 9857 n.13. The statement by Moore to which the dissent alludes, which he made to the police the evening before his confession, does not contain nearly as much information as the dissent makes out. Moore stated only that Salyer "was talking about going and confronting [Rogers] about the break in at the cabin and he also wanted to talk to [Rogers] about the boom box and who took it." He said nothing about "ranting and raving," nothing about "scar[ing] [Rogers] out of ever committing another [robbery]," and nothing about the existence or number of witnesses who observed the defendants planning their

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[31] That evidence the state could have or would have obtained from independent sources that would not be tainted by the information previously obtained as a result of the unlawful confessions is a question that is highly speculative and impossible to determine at this time on appeal.

visit to Rogers. Moore further stated that, upon arriving at Rogers's motor home, "some guy" confronted Woolhiser, but Woolhiser "walk[ed] away" and "over towards to [sic] motor home." According to Moore's statement, Salyer "was talking to [Rogers] about the stolen stuff and the punctured tires. . . . [T]hey only stayed at the motor home for approximately 15-20 minutes or just enough time to drink two beers." At no point did Moore discuss covering the car's license plates with duct tape, nor did he mention "other people," beyond the one person who confronted Woolhiser, being present at Rogers's home. Certainly he said nothing about kidnapping Rogers, beating him, putting him in the trunk, or shooting him. In fact, he denied doing so.

The evidentiary problems that a successful suppression motion would have created for the state are therefore quite severe. Establishing that critical evidence was discovered independently of the confessions would have presented serious if not insurmountable problems. For purposes of this habeas appeal, however, the most important point is that the state made no attempt to separate any admissible evidence from the patently excludable evidence, and no court ever undertook that task. As a result, we cannot now consider the question or make a determination on appeal, for purposes of assessing the state's case, that any of the "evidence" referred to by our dissenting colleague is admissible.

Without the fruits of Moore and Woolhiser's confessions, the prosecution would have had tremendous difficulty meeting the high burden it faced. In view of

the weaknesses in the state's case, it is highly unlikely that, in the absence of his own recorded confession, Moore would have pled to felony murder. We thus cannot have any confidence that the outcome would have been the same had counsel filed a motion to suppress.

APPENDIX B

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

RANDY JOSEPH MOORE,

Petitioner,

v.

MITCH MORROW, Superintendent, Oregon State Penitentiary,

Respondent-Appellee.

No. 98C-15019

AFFIDAVIT OF KIM L. JORDAN

STATE OF OREGON)
) ss.
County of Josephine)

I, Kim L. Jordan, being first duly sworn on oath, depose and say:

1. I am an attorney licensed to practice law in the State of Oregon, and in that capacity I represented Randy Joseph Moore in *State of Oregon v. Randy Joseph Moore*, Josephine County Circuit Court Case No. 96CR-0118. I make this affidavit in response to petitioner's claim of inadequate assistance of trial counsel.

2. I did not fail to review petitioner's statement to the police. I read it many times and discussed it at length and in detail with Mr. Moore. He affirmed to me that it was true, and that it was accurate.

3. I did not file a Motion to Suppress. My reasons for doing this were two-fold. First of all petitioner's interview with the police, which was taped and transcribed, a copy of the transcription is attached to this affidavit, makes it abundantly clear that Mr. Moore was not in custody. He never believed that he was in custody and admitted to me that he realized he was not in custody when he and his brothers and another friend voluntarily came to the police department to give the recorded statement. The law as I understood it then and now is exemplified by *State ex rel Juv. Dept. v. Loredo*, 125 Or App 390, and *State v. Smith*, 31 Or 1.

4. In addition, however, Mr. Moore had previously given a full confession to his brother Raymond Moore and to a woman named Debbie Ziegler. Mr. Moore and I discussed the possibility of filing a Motion to Suppress and concluded that it would be unavailing, because in the first place, he knew he was not in custody at the time he gave the recorded interview and that the statement was voluntary, and in the second place, he had previously made a full confession to his brother and to Mr. Ziegler, either one of whom could have been called as a witness at any time to repeat his confession in full detail.

5. Mr. Moore's older brother Raymond was an active church member and I investigated his church status to determine whether, under the rules of the church to which he belonged, he had the right to hear confessions and could therefore claim some privilege. Raymond Moore did not hold a position in his church that allowed him to hear confessions and therefore, in

my opinion, no priest-penitent privilege applied to anything Randy Moore had previously told to his brother in their pre-police interview conversation.

6. I believe that I reviewed every aspect of the law and the facts regarding this case. I discussed the case at length with Mr. Moore and reviewed the extensive police reports, some of which are attached to this affidavit. I do not recollect any material statement of fact in the police report with which Mr. Moore disagreed. Mr. Moore always claimed his actual shooting of the victim was an accident, but there was never the smallest doubt that it occurred during a kidnap which began with an assault. We discussed at length the felony murder rule. We also discussed at length the fact that he had not yet been indicted for any conduct and that it was possible that when an indictment came down from the grand jury, it could be for any charge up to and including aggravated murder and that in fact, the grand jury had not yet considered his case, so that the options were fully open for the district attorney to seek whatever charge or charges the district attorney thought might be justified.

7. At no time did I ever tell Mr. Moore that he could receive the death penalty if convicted "although petitioner was not charged with aggravated murder." I discussed at great length with Mr. Moore the definitions of "aggravated murder," "murder," and "felony murder." I did tell Mr. Moore that if he were charged with aggravated murder and if the jury decided that murder had been committed under ORS 163.095(e), in the course of or as a result of intentional maiming or torture," that it was not impossible that he might

be convicted of aggravated murder if he were ever in fact charged with aggravated murder. At no time did I ever tell Mr. Moore that he *was* charged with aggravated murder, or that I thought he *would be* charged with aggravated murder. We simply discussed all possibilities.

8. The victim in this case had been assaulted, bloodied, bound with duct tape, placed in the trunk of a car, taken to an isolated rural location, marched into the woods while still bound, and shot. Furthermore, the victim had an extremely large protruding abdominal hernia for which he always wore a truss. I discussed with Mr. Moore the possibility that if he were ever charged with aggravated murder that the jury might, after taking into account all of the facts of the case, conceivably find that he had engaged in "torture" of a helpless and somewhat disabled victim. I did not ever tell Mr. Moore that I thought that this was going to be what he was charged with or convicted of. I then felt that it would have been malpractice on my part not to have pointed out to him this was a possibility, however remote. I would still consider it malpractice not to have brought it to his attention, or to have attempted to assure him that this would not or could not happen to him.

9. Attached to this affidavit is a copy of the plea petition signed by Mr. Moore in connection with his plea to the final single charge of felony murder. On the face of the plea petition, it states that he is to receive "life parole" and on the addendum to the plea petition it clearly notes that "Measure 11" and ORS 137.700 apply to his case. I carefully explained to Mr.

Moore and he clearly understood that "Measure 11" had been codified by the legislature and that ORS 137.700 stood independent of "Measure 11."

10. I simply never told Mr. Moore that he would retain 5th Amendment rights against self-incrimination by entering a plea of no contest. We discussed the possibility of him being called as a witness to testify against a third codefendant, Roy Salyer, because his plea would waive any right he might have against his plea would waive any right he might have against self-incrimination. Mr. Moore was willing to testify against Mr. Salyer if called as a witness. Mr. Moore understood perfectly that by entering a plea of no contest he waived any rights he might have against future self-incrimination and understood that he could be compelled as a witness against the codefendant if the state served him a subpoena to compel his testimony.

11. I did not inform Mr. Moore that he could be sentenced under ORS 137.635. He *was not* sentenced under ORS 137.635 and there was never a suggestion that he might be sentenced under 137.635. Attached to this affidavit is a copy of the sentence order in Mr. Moore's case which shows on its face that he was sentenced under Measure 11, ORS 137.700 and ORS 163.115(5)(b). Frankly, I do not know why the court made reference to 137.635 in the Judgment Order except to make it clear that Mr. Moore was not eligible for any kind of diminishment of sentence under any law whatsoever. If this created some kind of a constitutional issue by virtue of the Court entering what I

believe to be empty surplus verbiage on the Sentence Order, then questionably, I did miss it.

12. I never did advise Mr. Moore that if he did not take the plea offer his brother Lonnie Wollheiser would also be charged with felony murder. Scott Titzler, the Deputy District Attorney in charge of the case made it absolutely clear that although he was making a settlement offer to Mr. Moore and his brother at the same time, and that while Mr. Moore was to be charged with murder, and his brother was to be charged with lesser offenses, the two plea offers were not contingent upon one another, but were based upon Mr. Titzler's independent evaluation of the respective cases.

13. It was clear, I believe, in everybody's mind, that Mr. Moore denied any premeditated intent to kill the victim, but that it was an accidental killing in the course of an assault and kidnapping. Under the facts it was quite clear the Mr. Moore's brother was less physically involved in the actual killing than was Mr. Moore. Mr. Moore was actually holding the gun which fired the fatal shot. Scott Titzler made it perfectly clear to me and I made it perfectly clear to Mr. Moore that the offer made to him was separate from and unconnected with the other offer made to his brother. Mr. Moore was, throughout our association, probably more concerned about his brother than about himself. Mr. Moore believed that he was guilty of murder under the felony murder rule, although he felt that it was very unfortunate and lamentable that he was guilty since he always maintained that the actual firing of the shot was an accident rather than a pre-

meditated act. Mr. Moore felt very strongly that his younger brother, Lonnie Wollheiser, was much less culpable then he was himself and was very interested in the offer the State was making to his brother.

14 Mr. Moore and I discussed at great length whether it was in his best interest to try to press the case to early resolution or to waive all time constraints for speedy trial and immediate indictment in an attempt to secure the best possible resolution of the case. Mr. Moore was fully aware of his right to speedy trial, and of his right to speedy presentment to a grand jury by requesting a preliminary hearing. After full discussion with me, he voluntarily waived those rights.

15 The allegation that there is a defect in the charge because the information was filed in District Court rather than in Circuit Court is simply a misunderstanding on Mr. Moore's part of the procedural path that felony criminal charges took through the justice system at that time. All felony informations were filed in District Court at that time, and the only way to bring a felony matter to resolution in Circuit Court was by waiving presentment by requesting a preliminary hearing or by insisting on a grand jury indictment. There is no constitutional defect either in the delay or in the court in the venue in which the charges were initially presented.

16 I never coerced Mr. Moore into doing anything. I have been practicing law since 1967 and have always served exclusively as defense counsel. The negotiated plea which we entered into with the district attorney did not include any charges of Measure 11 as-

sault or Measure 11 kidnapping. I thought that it was the best we could do under the circumstances and I told Mr. Moore this. I also made it very clear every time it came up, that the decision of whether to take or to reject a plea offer was entirely Mr. Moore's responsibility.

17 I informed Mr. Moore that I frankly believed if we went to trial he would be found guilty of assault, kidnapping, and murder (as was his codefendant, Roy Salyer, who chose trial as an option), but I did not presume to tell Mr. Moore what he should do. I only told him what I thought the result would be of the various choices he had before him. I explained to Mr. Moore that if he chose not to accept the offer which the State had made to him, I expected that the district attorney would charge him with assault in the first degree, kidnapping, and murder, and would go to trial on those charges. At no time during our association did I ever tell Mr. Moore what he should do. I only explained to Mr. Moore as carefully as I could what I thought the result would be of his actions if he chose one option or another.

18. As I have discussed above in connection with paragraph (d)(E), I did not object to "the sentencing court's imposition of sentence under ORS 137.635." Mr. Moore was not sentenced under that statute. I did not believe that he had been sentenced under that statute. I am confident the judge did not believe he had been sentenced under that statute, and I am confident the district attorney did not believe he had been sentenced under that statute. Furthermore, Mr.

Moore did not believe he had been sentenced under that statute.

19. From my thorough discussions with Mr. Moore, I know that he believed that he was being sentenced under "Measure 11" and its statutory codification, ORS 137.700. Mr. Moore understood that under the terms of "Measure 11" and ORS 137.700, he would be eligible for no early release, no halfway houses no reduction in sentence under any statute and that he could expect to serve all of the 300 months to which he understood he would be sentenced. We discussed at length his current age and how old he would be at the end of 25 years. We discussed the likelihood of whether he would survive to be released. I am certain Mr. Moore had no illusions as to the law he under which he was being sentenced or as to the terms of the sentence he was going to be required to serve.

/s/ Kim L. Jordan

Kim L. Jordan
Attorney at Law

SUBSRIBED AND SWORN to before me this 26th day of February, 1999.

/s/ Kathleen M. Van Dyke

Kathleen M. Van Dyke
Notary Public for Oregon
My Commission Expires: _____

BERZON, Circuit Judge, concurring:

I concur in Judge Reinhardt's result and almost all of his opinion.

The pivotal questions are simply whether the Oregon state court was unreasonable in its determination that Moore did not (1) receive deficient representation of counsel that (2) prejudiced his case. Because the state has, by forfeiture, acknowledged that Moore's confession was involuntary for the purposes of this appeal, I see no reason to reach that issue de novo. I therefore do not concur in footnote ten of the majority opinion, which does so. Except for any references to footnote ten's voluntariness holding elsewhere in the text, I concur fully in the remainder of the opinion.

In particular, I concur in Judge Reinhardt's discussion of why Moore's counsel's failure to move to suppress his confession prejudiced Moore, in that I believe, to the extent that *Hill v. Lockhart*, 474 U.S. 52 (1985), provides the proper prejudice standard here, Moore has fulfilled it for the reasons which Judge Reinhardt supplies. I write separately, however, to note that I believe that Moore could also demonstrate prejudice more directly under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Under *Kimmelman* and *Strickland*, the state court could have found prejudice if it were reasonably probable that the failure to file a meritorious motion led to an increase in jail time for Moore — through, for instance, a loss of plea bargain leverage.

While Judge Reinhardt uses *Kimmelman* to address *Strickland*'s ineffectiveness prong, both he and Judge Bybee depart from the straightforward prejudice inquiry of *Strickland*'s prejudice prong as used in *Kimmelman*, instead applying the standard used in *Hill*. On examination however, *Hill* deals with the narrow set of cases within the larger plea context in which counsel advised the defendant to take a plea (which may have been poorly-negotiated or ill-informed) rather than go to trial, and the defendant challenges this *advice* (rather than, for instance, pre-trial motions that bore on the plea process) as ineffective assistance of counsel. To show prejudice under *Hill*, the defendant must allege that he would have gone to trial save for the counsel's bad *advice*. As *Hill* does not speak to the context of ineffective assistance with regard to pre-trial motions and how they may affect whether a particular plea offered is accepted, its prejudice standard need not be met here, even if it is available as an alternative means of showing prejudice. Put differently, *Hill* provides that, once motions practice and discovery have set the legal landscape, prejudice can be judged *without* showing a different ultimate outcome for the defendant, if counsel's advice to take a particular path through that landscape, pleading guilty, was badly wrong. *Strickland* and *Kimmelman*, instead, deal with counsel's failure to *create* a proper legal landscape — by, for instance in this case, failing to file a plainly meritorious suppression motion. Below, I discuss the *Kimmelman/Strickland* prejudice standard in more detail, explain why the *Hill* standard is not necessary

to the disposition here, and conclude that Moore was prejudiced under either standard.

I. Analysis

a. *Strickland and Kimmelman*

Under *Strickland*, Moore "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the *result* of the proceeding would have been different." 466 U.S. at 694 (emphasis added). This prejudice standard is a generic one, and *ordinarily* governs ineffective assistance of counsel cases. *See, e.g., Wilson v. Henry*, 185 F.3d 986, 988 (9th Cir. 1999) (relying on *Strickland* to state the standard for a 28 U.S.C. § 2254 ineffective assistance of counsel case). Two elements of the *Strickland* standard are particularly important:

First, Moore need only show a "reasonable possibility" of a different outcome. *Strickland*, 466 U.S. at 694; *Wilson*, 185 F.3d at 988.

Second, applying *Strickland*, the Supreme Court has established that "any amount of actual jail time has Sixth Amendment significance." *Glover v. United States*, 531 U.S. 198, 203 (2001). *Glover* held that "if an increased prison term did flow from an error the petitioner has established *Strickland* prejudice."[1] *Id.* at 200; *see also Argersinger v. Hamlin*, 407 U.S. 25, 32, 37 (1972) (holding that Sixth Amendment right to

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[1] Indeed, this conclusion was so obvious that the Court reached it unanimously and the government conceded the point. *Glover*, 531 U.S. at 202. Thus, it was very likely clearly established even before the Court decided *Glover*.

counsel applies to any case where "imprisonment even for a brief period" is possible); *id.* at 37 (quoting *Baldwin v. New York*, 399 U.S. 66, 73 (1970) (stating that "the prospect of imprisonment for *however short a time* will seldom be viewed by the accused as a trivial or 'petty' matter . . . .") (emphasis added)).

Accordingly, if Moore can show a "reasonable probability" that absent his counsel's ineffective performance he would have obtained a verdict leading to less time in prison, then, applying *Strickland* and *Glover*, he has satisfied the prejudice prong of the ineffective assistance of counsel test.

Kimmelman makes clear that the usual *Strickland* analysis applies in the context of a lawyer's incompetent failure to file a timely suppression motion. *Kimmelman*, 477 U.S. at 383-91. Specifically, *Kimmelman* stated that to show prejudice in the suppression motion context, the defendant must demonstrate "that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Id.* at 375. We have read *Kimmelman* as establishing that "[t]o show prejudice under *Strickland* from failure to file a motion, [the defendant] must show that . . . had the motion been granted, it is reasonable that there would have been an outcome more favorable to him." *Wilson*, 185 F.3d at 990.

In *Kimmelman*, of course, the question was whether the defendant would have received a different verdict at trial had the evidence been suppressed. Absent a meritorious motion, the evident answer to that query is no. But *Kimmelman* does not restrict its outcome-oriented, *Strickland*-based, prejudice stan-

dard to the full trial context, and no reason appears why it should be so limited. In this case, as the course of Moore's pretrial proceedings and trial remained open, the parallel question is whether the filing of his meritorious suppression motion would have affected the plea bargain negotiations, with the "reasonable probability" that the outcome of those negotiations would have been more favorable to Moore.

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— did not deal with circumstances in which the asserted pre-plea constitutional violation was *ineffective assistance of counsel* with regard to pre-trial practice, as opposed to constitutional violations by the court or the prosecution. As to the latter variety of pre-plea constitutional violation, we assume that the petitioner had effective assistance of counsel in determining whether or not to challenge those violations in a timely manner, and so consider any such challenge waived as part of the guilty plea. *Kimmelman* explains that where that is not the case — where the very counsel who is advising the criminal defendant is constitutionally ineffective in setting the legal background for later proceedings, because he or she fails to file essential, meritorious pretrial motions,

> collateral review will frequently be the only means through which an accused can effectuate the right to counsel . . . . A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance . . . ; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal.

477 U.S. at 378.

In other words, where there is ineffective counsel who continues to advise the defendant past the point

at which it would ordinarily be proper to make a constitutional challenge, the usual rules regarding the timing of such a challenge — in *Kimmelman*, the rule that Fourth Amendment challenges must be made at trial or on direct appeal, not during collateral challenges, *see Stone v. Powell*, 428 U.S. 465 (1976); here, the rule that any pretrial challenges to potential evidence must be made before pleading guilty (or preserved for later challenge in a conditional guilty plea) — cannot apply, because the premises upon which they rest are absent. "The Sixth Amendment mandates that the state bear the risk of constitutionally deficient assistance of counsel," not a defendant who cannot forward his rights because of counsel's incompetence. *Kimmelman*, 477 U.S. at 379.

Thus, under *Strickland* and *Kimmelman*, to show prejudice, Moore could demonstrate that the plea bargain outcome would have been improved upon by filing the meritorious suppression motion that was not filed because of ineffective assistance of counsel.

b. *Strickland and Hill*

Rather than apply this basic *Strickland* analysis through the lens of *Kimmelman*, Judges Reinhardt and Bybee both rely on language in *Hill*: "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. Judge Bybee insists that *Hill*'s standard provides the exclusive analysis for all ineffective assistance cases involving a plea. Judge Reinhardt assumes that *Hill* is the appropriate standard and

makes a convincing case that Moore would have gone to trial but for his counsel's failure to file the suppression motion, thereby meeting that standard.

On the analysis I propose, however, there is no need to focus on whether the *Hill* standard is met. Essentially our problem is deciding whether it is only the *Hill* prejudice standard, which deals with some varieties of plea bargain ineffective assistance cases, or also the *Kimmelman* standard, which deals with the impact of the failure to file meritorious motions, that controls here. Neither case is *directly* on point on its facts, as *Hill* was a different kind of plea bargain case, while *Kimmelman* involved a trial. But the *Kimmelman / Strickland* standard is the *generally* applicable one, and therefore applies in the first instance here, even assuming that *Hill* provides an available alternative route. *Cf. Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1671 (2007) (holding that a state court decision is "contrary to," or an "unreasonable application of," clearly-established law if it "ignore[s] the fundamental principles established by [the Supreme Court's] most relevant precedents").

What is critical in considering whether *Kimmelman* applies is that *Hill varies* the generally applicable prejudice standard where there is a guilty plea, to permit application of *Strickland* even where there is no indication that, by choosing trial, the petitioner would have avoided conviction or lessened his sentence. *Hill* indicates that Moore can prevail if he simply proves that he would have gone to trial had his confession been suppressed. But nothing in *Hill* pre-

cludes a petitioner who pleaded guilty from meeting the ordinary *Strickland* standard.

This commonsense conclusion is confirmed by *Hill*. *Hill* governs cases in which defendants face a binary choice between pleading guilty and going to trial, and concludes, in essence, that in that situation, the defendant need *not* meet the usual *Strickland* prejudice standard by showing that he would have been better off in terms of outcome had he gone to trial. *See* 474 U.S. at 59-60. But *Hill* does not suggest that this analysis need be the only one governing all plea bargain cases. Instead, *Hill* created an *additional* means to claim ineffective assistance of counsel, even when the alleged ineffective assistance might *not* have affected the ultimate adjudication of guilt or the sentence. It applies when the facts create such a binary choice, and the asserted prejudice is simply in foregoing a trial, regardless of the probable outcome of a trial.

The Supreme Court's discussion of *Hill* in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), reinforces this understanding. That case involved counsel's failure to file a notice of appeal, thereby forfeiting an entire proceeding just as the ill-advised defendant in *Hill* forfeited trial. Again, the two choices were between appealing and not appealing, so prejudice could only be evaluated on those terms. Furthermore, nowhere does *Roe* state that *Hill* limited *Strickland*, but only that the special prejudice rule of *Hill could* be applied to a case involving the decision to appeal. *Roe*, in fact, articulated the very difference between *Hill*-type cases — that is, advice cases — and cases such as this

one. The Court stated in *Roe* that "[i]n most cases, a defendant's claim of ineffective assistance of counsel involves counsel's performance during the course of a legal proceeding, either at trial or on appeal." *Id.* at 481. In contrast, *Roe*, like *Hill*, was "unusual in that counsel's alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." *Id.* at 483.

The present case, however, is not binary like *Hill* and *Roe*. Refusing to plead no contest to the murder charge before filing a motion to suppress his confession would not necessarily have set Moore on a course for trial. Rather, it would have set him on a course for preliminary motions (on suppression motions for evidence flowing from the confession and, perhaps other pretrial claims) and, then, for further plea negotiations once the motions were resolved. Thus, if Moore could show a reasonable probability that he would have obtained a better plea bargain had his attorney moved to suppress his confession, as I demonstrate below that he can, he would not need the assistance of the special prejudice rule in *Hill*. Instead, if he can meet the ordinary *Kimmelman*/*Strickland* prejudice standard, that is sufficient under my approach.

Put a bit differently, the prejudice standard *Hill* sets out for the binary choice circumstance is a narrow statement of the general standard set out by *Strickland* and *Kimmelman*. The prejudice inquiry for defendants in Moore's situation can, as a result, be stated in *Hill* terms, but need not be. Defendants in such circumstances are still, ultimately, choosing

between pleading and going to trial, but the time period available for the choice is longer. Such defendants can credibly "show that there is a reasonable probability that, but for counsel's errors, [they] would not have pleaded guilty and would have insisted on going to trial," *Hill*, 474 U.S. at 59, in response to the plea bargain originally offered them. But they might well take a different, better plea agreement if competent counsel engages in motions practice to improve the position of the defense. So, while there is no reason to use *Hill*'s specialized language in such cases, *Hill*'s standard is still satisfied. It is far more sensible, however, to address such cases directly, by applying the general *Kimmelman/Strickland* inquiry.

The case law does not in any way preclude this limited understanding of *Hill*. I am aware of no case — and Judge Bybee cites none — that addresses why *Kimmelman* and *Strickland* do *not* apply in circumstances like those we consider today. Many plea cases address the *Hill* situation, and so apply the *Hill* standard directly, having no reason to address *Kimmelman* and *Strickland*. Some other cases, it is true, assume (as Judge Reinhardt does today) that *Hill* also applies in the motions context when a plea bargain is involved, as well as in the advice context, but these cases do not provide support for using *Hill* as the exclusive standard in such circumstances. *See* Maj. op. at 9786-87 n.14 (discussing such cases). That we have sometimes assumed that *Hill* applies in the

motions context does not justify abandoning the usual *Kimmelman / Strickland* approach in that context.[2]

Hill was not initially designed for the present circumstances, and I can see no reason why the petitioner in a case such as this one cannot at least *choose* to meet the regular *Kimmelman / Strickland* prejudice standard.

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[2] I note that if *Hill* is read to limit the prejudice standard in the motions context to the question whether there is a reasonable probability that the defendant would have pursued further court proceedings rather than taking the plea, there is no reason why that proceeding should be *trial*, rather than a suppression hearing. A guilty plea forfeits not only the merits trial but other judicial proceedings, such as an evidentiary hearing concerning whether a confession was voluntary. *McMann*, one of the underpinnings of *Hill*, certainly provides no justification for focusing on forgoing trial, rather than on forgoing other court proceedings, when assessing prejudice resulting from a guilty plea infected by ineffective assistance of counsel. The defendants in that case, under then-applicable state law, could *only* attempt to suppress their confessions *at trial*, rendering the two proceedings effectively synonymous. *See* 397 U.S. at 772-74. It is now constitutionally required that a judge rather than a jury decide the admissibility of a confession. *See id.* at 772. But if a defendant can show a reasonable probability that he would not have forfeited a hearing before a judge on the issue, save for his counsel's advice to waive that opportunity by pleading guilty, I would read the "trial" reference in Hill as encompassing that evidentiary hearing, which is just as connected to the trial itself as would be a mid-trial hearing of a similar kind.

c. Prejudice and Prosecutors

The dissent argues that the approach I describe would "place[ ] federal courts in the role of instructing state prosecutors . . . how to conduct plea negotiations," implicating federalism concerns. *See* Dis. op. at 9876. It also contends that inquiring into whether competent defense counsel could have improved the defendant's leverage to seek a better plea bargain runs against the general wisdom that courts are ill suited to "review . . . prosecutorial decisions," thereby raising separation of powers issues. *See* Dis. op. at 9876-78. These concerns have no place whatever in the current context.

I agree with the dissent that "[p]rosecutorial . . . decisions are particularly ill-suited for broad judicial oversight." Dis. op. at 9876 (quoting *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299-1300 (9th Cir. 1992), *overruled on other grounds, United States v. Armstrong*, 48 F.3d 1508, 1515 n.5 (9th Cir. 1995) (en banc)). Prosecutorial discretion is, indeed, broad, although not unfettered. *See Wayte v. United States*, 470 U.S. 598, 607-08 (1985). So, if Judge Bybee were correct that my approach would give federal courts the right to dictate plea bargains and charging decisions, I would share his concerns.

But nothing in the *Kimmelman/Strickland* approach implicates such matters. The question is not what a prosecutor should have charged, nor what a "fair" plea bargain should have been. Rather, the question is whether, but for counsel's ineffective assistance, a defendant would have been in a better position to negotiate with the prosecutor. It, therefore,

concerns the *defendant's* and *defense counsel's* choices, *defense counsel*'s judgment, and *defense counsel*'s actions, not, in the first instance, that of the prosecutor. That this assessment requires some consideration of the defense counsel's position with regard to the prosecutor's case is inherent in *any* prejudice inquiry, whether under *Hill* or the more general framework of *Kimmelman* and *Strickland*, and does not convert asking the question into an assault on prosecutorial discretion.

I acknowledge that, as the dissent points out, the *Kimmelman / Strickland* analysis of the defendant's plea bargain leverage is "counterfactual," will be conducted "in most cases, years after the decision to offer the challenged plea bargain," and may be difficult. Dis. op. at 9875. Unlike Judge Bybee, however, I do not think that asking courts to consider these matters poses an "impossible question."[3] *See id.* First, the prejudice inquiry is *always* counter-factual — we are asking, after all, whether there "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694 — and generally occurs years after the fact if it has reached an appellate court. So, that objection is not uniquely directed at the plea bargain inquiry I suggest, but is instead a critique of the prejudice inquiry generally.

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[3] One reason the dissent may think the inquiry is so difficult is that it portrays the question as whether the prosecutor *would* offer a better plea bargain, *see* Dis. op. at 9874-75, rather than whether it was *reasonably probable* that defense counsel could secure such an arrangement.

Further, while the plea bargain process is complex, so is trial. To answer the prejudice question in the trial context, one must consider the weight of the present evidence, the views of the jury, the choices of the defense and, yes, the prosecutor. Yet courts, undaunted, do so. *See, e.g.*, *Schriro v. Landrigan*, 127 S. Ct. 1933, 1943-44 (2007) (considering whether a capital defendant was prejudiced by his counsel's failure to introduce mitigation evidence); *Williams v. Taylor*, 529 U.S. 362, 396-98 (2000) (concluding that a defendant was prejudiced by counsel's failure to investigate his background, which would have resulted in additional mitigation evidence); *Lopez v. Schriro*, 491 F.3d 1029, 1044 (9th Cir. 2007) (holding that defense counsel's failure to object to medical evidence did not prejudice the defendant). I cannot say that assessing, for instance, whether a jury would have ruled differently on a death sentence, *see Landrigan*, 127 S. Ct. at 1943-44; *Williams*, 529 U.S. at 396-98, is so obviously easier than deciding whether a defendant would be in a better plea bargaining position as to warrant characterizing the latter question as "impossible" for courts to answer.

Nor, for that matter, is inquiring into a defendant's plea bargaining leverage self-evidently harder than determining whether "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. There, too, we must inquire into the strength of the defendant's case and the sentence the prosecutor likely would have sought (albeit at trial, rather than as part of a plea bargain).

That inquiry, again, is not particularly easier than the plea bargain leverage question.

My point, in sum, is this: Leaving aside the entirely out-of-place constitutional problems that the dissent raises, the objection that the prejudice inquiry outlined here is "counterfactual," and may sometimes be difficult to apply, does not distinguish *this* prejudice inquiry from other sorts that we regularly carry out. It is not, in my view, a sufficient reason to abandon it.

d. Application

As I agree with Judge Reinhardt that Moore's counsel was ineffective because he failed to file a meritorious suppression motion, and had no good reason not to do so, all that remains to determine is whether this failure prejudiced Moore. Judge Reinhardt ably explains why Moore meets *Hill*'s standard for prejudice and I, assuming *Hill* is the proper standard, concur in his application of it. Moore also meets the *Kimmelman / Strickland* standard which I believe also applies, essentially for the same reasons that Judge Reinhardt explains in the context of *Hill*. Just as suppressing the confession would have substantially strengthened Moore's case at trial, and so would have substantially influenced Moore's decision to go to trial rather than take the particular plea offered, so too — and even more obviously, given the risk-assessment nature of plea-bargaining — would it have improved his leverage to negotiate a plea bargain with reduced jail time. There is therefore a "reasonable probability" that Moore has suffered prejudice as to the actual sentence imposed, and it was un-

reasonable of the state court not to find prejudice here.

II. Conclusion

For the reasons given by Judge Reinhardt as well as for the reasons set forth in this concurrence, I conclude that the state court unreasonably failed to determine that counsel's failure to file a meritorious suppression motion constituted deficient performance, and that such deficient representation prejudiced Moore. Accordingly, I agree with Judge Reinhardt that we should grant Moore's petition for habeas corpus.

BYBEE, Circuit Judge, dissenting:

Randy Moore and others beat Kenneth Rogers until he bled, stripped him, bound him in duct tape, placed him in the trunk of a car, drove him to a remote location, and forced him to march up a hill at gunpoint. While marching Rogers through the woods, Moore shot Rogers—accidentally, he said —through the temple. Moore confessed to his older brother, Raymond, and his step-brother's girlfriend, Debbie Ziegler, what he had done. He then talked to police, corroborating the evidence the police had already obtained. Before Moore could be indicted, he negotiated a plea bargain under which Moore obtained the lowest sentence available under Oregon law for felony murder. Moore's counsel, an experienced defense attorney, recommended that he accept the offer. Counsel explained that he did not think he had grounds to suppress Moore's formal confession and, even if he

could have suppressed it, Raymond and Ziegler could "repeat [Moore's informal] confession in full detail." Under the circumstances, counsel thought he had secured the best deal he could get for Moore. The Oregon courts and the district court agreed.

Not so, says the majority: Moore's attorney offered constitutionally deficient advice because he advised Moore to accept the plea offer before he moved to suppress Moore's confession to the police. The majority reasons that Moore would have prevailed on a motion to suppress, and, knowing the state was without his confession, Moore would have insisted on going to trial rather than pleading guilty to felony murder. The majority dismisses counsel's explanation that there was no reason to go to trial in any event because the state had a second confession—Moore's confession to Raymond and Ziegler—by ignoring the state and the district court's findings and entering its own findings: The majority finds that "it is far from clear what those witnesses would have said," and wonders "to what extent their testimony would have been persuasive to a jury." Maj. Op. at 9799. Furthermore, the majority concludes, Raymond was "a hostile witness, [so] it is unlikely that [the state] would have been able to elicit much of the information it desired from him." *Id.* at 9800 n.24.

The majority not only entered its own findings of fact, it found its own law as well. In this AEDPA-governed case, the majority holds that the Oregon state court's decision was "contrary" to the statement in *Arizona v. Fulminante* that "a confession is like no other evidence" and is "the most probative and dam-

aging evidence that can be admitted against [a defendant]." 499 U.S. 279, 295 (1991) (quotation marks and citation omitted). *See* Maj. Op. at 9766-67, 9780, 9794-96, 9798, 9807. The majority's reliance on *Fulminante* is twice remarkable: First, *Moore does not even cite Fulminante*, nor was it cited by the district court, the state court, or any other party. Second, the majority's repeated insistence that "a confession is like no other evidence" is its own undoing. Counsel negotiated a plea because he knew what the majority cannot bring itself to admit: Moore had confessed to two other people before he confessed to the police, and their confessions were plainly admissible and independently damaging.

In the process of second-guessing counsel, the Oregon courts, and the district court, the majority clearly establishes a dramatic proposition: After *Kimmelman v. Morrison*, 477 U.S. 365 (1986), *Strickland v. Washington*, 466 U.S. 668 (1984), and *Arizona v. Fulminante*, when a motion to suppress a confession is potentially "meritorious," counsel's failure to file the motion constitutes deficient and prejudicial conduct if there is any possibility that filing the motion would have caused a defendant to choose a trial over the plea. The majority's principle applies regardless of how many witnesses a defendant has confessed to, how many co-defendants are available to testify against the defendant, or any other evidence available in the record. *See* Maj. Op. at 9792-9807. According to the majority, if counsel has any grounds for moving to suppress a confession and there is any possibility the defendant would have gone to trial, the failure to move for suppression satisfies both prongs

of *Strickland*. It is, absolutely, error and, absolutely, prejudicial.

The majority's position is unfathomable. Not only is its conclusion not supported by Supreme Court authority, *see Hill v. Lockhart*, 474 U.S. 52 (1985), it contradicts the Court's holdings. Indeed, the contrary proposition was clearly established in *McMann v. Richardson*: "In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." 397 U.S. 759, 770 (1970). And, if we needed further evidence, the majority's opinion contravenes the Court's most recent AEDPA decision, *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009): "[T]his Court has never required defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance for success." Counsel cannot be faulted for not going to trial just because a majority of our court thinks he had "nothing to lose." *Id.* at 1419. In fact, Moore had everything to lose—he could have faced far more severe charges and even the death penalty. He got good advice from his counsel and a good deal from Oregon.

For the reasons I explain below, I would affirm the judgment of the district court denying the writ. I respectfully dissent.

I. Whether Counsel's Conduct Was Deficient

On AEDPA review, we may only issue a writ of habeas corpus when the state court unreasonably applies "clearly established Federal law, as determined

by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also Carey v. Musladin*, 127 S. Ct. 649, 654 (2006); *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003). For an ineffective assistance of counsel claim, the clearly established Federal law that governs is *Strickland v. Washington*, 466 U.S. 668 (1984), which sets forth a two-step inquiry. "In order to establish ineffective representation, the defendant must" overcome a "highly demanding" standard and "prove both incompetence and prejudice." *Kimmelman*, 477 U.S. at 381-82.[1]

The majority finds that counsel was deficient on two grounds: Moore's statement to the police should have been suppressed, first, because it was involuntary and, second, because it was obtained in violation of *Miranda*. Oddly, the district court's finding that

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[1] To meet the first prong, "the defendant must show that counsel's representation fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 687-88, and overcome the "strong presumption that counsel's performance falls within the 'wide range of professional assistance,' " *Kimmelman*, 477 U.S. at 381 (quoting *Strickland*, 466 U.S. at 688-89). When the habeas petitioner alleges that his counsel was ineffective because of counsel's failure to file a motion, a necessary, but by no means sufficient, condition for a successful showing of incompetence is that the motion would have been meritorious. *See Kimmelman*, 477 U.S. at 375, 382. And, to meet the second, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Moore's confession was involuntary is not challenged by the state on appeal, and I agree with the majority that the question of voluntariness therefore is not properly before us. *See* Maj. Op. at 9780-82. I note that, were the issue preserved, a persuasive argument could be made that the confession was in fact given voluntarily. Since the state—inexplicably[2]—has not pressed this issue on appeal, I proceed on the assumption that Moore has demonstrated that his confession was involuntarily given.[3] However, that

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[2] The district court based its finding of involuntariness on an implied promise of leniency that the police allegedly gave to Moore. Yet, to use Moore's own words, the officers promised him "[n]othing other [than] helping the best [they] could." This offer to recommend leniency to the district attorney is inadequate to establish that "all of the attendant circumstances" indicate that " 'the defendant's will was overborne at the time he confessed.' " *Haynes v. Washington*, 373 U.S. 503, 513 (1963) (quoting *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963)); *see also United States v. Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988) ("An interrogating agent's promise to inform the government prosecutor about a suspect's cooperation does not render a subsequent statement involuntary, even when it is accompanied by a promise to recommend leniency or by speculation that cooperation will have a positive effect."). The record demonstrates that the police could not have promised anything other than a recommendation of leniency—and certainly could not promise a reduction of charges—because Moore had not been formally booked or charged when he made his confession.

[3] The conclusion that the state has forfeited its argument concerning the voluntariness of Moore's confession relieves us of the obligation to discuss the *Miranda* issue.

the state forfeited its argument concerning Moore's confession on appeal does not mean that the state has conceded the substantive merit of the issue, as the majority assumes it does. Thus the majority's claims that the state concedes both that Moore's taped confession was unconstitutional, Maj. Op. at 9766, and that a motion to suppress the confession would have been successful, Maj. Op. at 9789, are unwarranted and misleading.

Even conceding that the state has failed to challenge the involuntariness finding, I cannot concede that counsel's failure to move to suppress necessarily constitutes deficient conduct. It cannot be, as the majority today holds, that because counsel *could* have filed such a motion, he *must* have filed the motion. To the contrary, the Supreme Court recently held that an attorney is not even deficient if he declines to pur-

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It is not relevant to the rest of our inquiry—not even to "buttress[the majority's] conclusion that [counsel's] performance was highly deficient." Maj. Op. at 9781-82 & n.11. The majority's discussion of the *Miranda* claim in footnote 11 is thus double dicta—resolving the Miranda claim is unnecessary to the majority's decision, and its discussion is way beyond our charge under AEDPA. Likewise is the assertion that Moore's confession was inadmissible. *Id.* at 9806 n.27. I will not prolong my dissent with further discussion of the *Miranda* claim, except to note that there is substantial merit in the state's argument that Moore was not in custody when he invoked his right to counsel and, therefore, *Miranda* did not apply. And, certainly, the state courts' decision is not an unreasonable application of any Supreme Court decisions.

sue a strategy despite there being "nothing to lose" by pursuing that strategy. *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 & n.3 (2009).[4] Counsel "is not required to have a tactical reason— above and beyond a reasonable appraisal of a claim's dismal prospects for success" for declining to pursue a course of action. *Id.* at 1422. If anything, *Knowles* is a more extreme case than Moore's because the Court found that counsel in *Knowles* was not deficient despite advising his client not to pursue his only possible defense—the *Knowles* defendant truly had nothing to lose. In contrast, Moore's counsel elected not to move to suppress the confession because he doubted its merits and its ultimate effect. Additionally, though, unlike the

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[4] *Knowles* involved a defendant who plead not guilty and not guilty by reason of insanity ("NGI"). *Id.* at 1415. Counsel's strategy was to seek a second-degree murder verdict in the first stage of a bifurcated trial, and an NGI verdict in the second stage. *Id.* However, the jury evidently rejected the evidence of insanity the defendant offered in the first stage of the trial because it found him guilty of first-degree murder. *Id.* at 1415-16. Because the defendant's proffered evidence in the second stage of the trial would have been identical to the evidence offered in the first stage—before the same jury—counsel advised the defendant not to pursue the NGI plea. *Id.* at 1420-21. The Court, in holding that counsel was not deficient, stressed that counsel "is not required to have a tactical reason—above and beyond a reasonable appraisal of a claim's dismal prospects for success for recommending that a weak claim be dropped altogether." *Id.* at 1422. The Court noted that counsel had carefully weighed the options before making an informed decision. *Id.* at 1417.

Knowles defendant, Moore had a lot to lose: by going to trial he risked losing a lenient plea agreement and getting a far more severe sentence. Had counsel delayed negotiating a plea while waiting for Moore to be charged so a suppression motion could be filed, it might have cost Moore the opportunity to plead to such a minimal charge. If counsel in *Knowles* was not deficient despite having nothing to lose, surely Moore's counsel was not deficient when his client had much to lose.

Indeed, the majority's proposition runs directly counter to nearly forty years of established Supreme Court precedent, starting with *McMann v. Richardson*, 397 U.S. 759 (1970). The Court in *McMann* considered

> those situations involving the counseled defendant who allegedly would put the State to its proof . . . except for a prior confession that might be offered against him . . . . At least the probability of the State's being permitted to use the confession as evidence is sufficient to convince him that the State's case is too strong to contest and that a plea of guilty is the most advantageous course.

Id. at 767-69. Of these situations, the Court had this to say:

> [A defendant's] later petition for collateral relief asserting that a *coerced* confession induced his plea is at most a claim that the admissibility of his confession was mistakenly assessed and that since he was erroneously advised . . .

> his plea was an unintelligent and voidable act. *The Constitution, however, does not render pleas of guilty so vulnerable.* . . . In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, *not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.*

Id. 769, 770-71 (second and third emphasis added).

McMann is on all fours with Moore's claim.[5] Moore

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[5] The majority laments that my "invocation of *McMann v. Richardson* is misplaced" because "Moore's challenge is not to counsel's plea advice, as was the case in *McMann*, but to counsel's failure to file a motion to suppress." Maj. Op. at 9786 n.14. True enough, the claim in McMann was styled as a challenge to the voluntariness of a plea. But the *McMann* Court treated the claim as one of ineffective assistance of counsel. *See McMann*, 397 U.S. at 770 ("[D]efendants facing felony charges are entitled to the effective assistance of competent counsel . . . . [The] matter . . . should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . ."). Further, although *McMann* was decided before *Strickland* and *Hill*, those two cases were built upon and reaffirmed *McMann*. "In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competence already set forth in *Tollett v. Henderson* and *McMann v. Richardson*." *Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985). McMann informed the creation of the first part of the two-part test in *Strickland*. *See* 466 U.S. at 687 ("[T]he proper standard for attorney performance is that of reasonably effective assistance. The Court indirectly recognized as much when it stated in *McMann v. Richardson* that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not a 'reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in criminal cases.' " (quoting *McMann*, 397 U.S. at 770-71)); *see also Kimmelman*, 477 U.S. at 377-78 (citing *McMann*); *Hill*, 474 U.S. at 57-58; *accord Langford v. Day*, 110 F.3d 1380, 1386-87 (9th Cir. 1996) (applying *McMann*, as interpreted

asserts that his trial counsel was ineffective in failing to file a motion to suppress Moore's confession and that he would not have pled no contest to felony murder if he had received competent assistance from counsel. Although filing the suppression motion might seem like a good tactical move now, accepting the state's plea bargain was the strategic thing to do, knowing what counsel knew at the time. Indeed, counsel's obligation to explain the risks of trial in light of a plea offer is far more nuanced than the majority's new mandatory scorched-earth litigation strategy. Moore's trial counsel has carefully explained

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by *Hill*, in case alleging ineffective assistance of counsel based on failure to file various suppression motions). Indeed, the question in *McMann* and the question here are *identical*: whether a reasonably competent attorney would have foregone the suppression motion and advised the client to plead guilty. If *McMann* means anything, it means that counsel's advice on the admissibility of a confession is not unreasonable simply because two federal judges disagree with it years later. The majority cites two cases that it holds out as establishing that we have recognized "*Kimmelman*-type *Strickland* claims . . . in cases in which the defendant pled rather than going to trial." Maj. Op. at 9787 n.14. These cases provide, at best, weak support for the majority's assertion that *McMann* should not inform our analysis here. In both cases, we concluded that the defendant's claim of ineffective assistance failed because the decision not to file the motion was a strategic one or because the defendant insisted on forgoing the motions. *See Weaver v. Palmateer*, 455 F.3d 958, 972 (9th Cir. 2006); *Langford*, 110 F.3d at 1386-88.

by affidavit his reasons for not filing the motion to suppress:

> I did not fail to review [Moore's] statement to the police. I read it many times and discussed it at length and in detail with Mr. Moore. He affirmed to me that it was true, and that it was accurate.
>
> I did not file a Motion to Suppress. My reasons for doing this were two-fold. First of all, [Moore's] interview with the police, which was taped and transcribed . . . makes it abundantly clear that Mr. Moore was not in custody. He never believed that he was in custody and admitted to me that he realized he was not in custody when he and his brothers and another friend voluntarily came to the police department to give the recorded statement. . . .
>
> [I]n the second place, he had previously made a full confession to his brother [Raymond] and to Ms. [Debbie] Ziegler, either one of whom could have been called as a witness at any time to repeat his confession in full detail. . . .

Counsel explained to Moore, as any competent counsel would, that there was a possibility that the state might charge Moore with aggravated murder because

> [t]he victim in this case had been assaulted, bloodied, bound with duct tape, placed in the trunk of a car, taken to an isolated rural location, marched into the woods while still bound, and shot. Furthermore, the victim had an ex-

> tremely large protruding abdominal hernia for which he always wore a truss. I discussed with Mr. Moore the possibility that if he were ever charged with aggravated murder that the jury might, after taking into account all of the facts of the case, conceivably find that he had engaged in "torture" of a helpless and somewhat disabled victim.

For this and other reasons, counsel feared severe consequences if his client went to trial:

> Mr. Moore always claimed his actual shooting of the victim was an accident, but there was never the smallest doubt that it occurred during a kidnap [sic] which began with an assault. We discussed at length the felony murder rule. We also discussed at length the fact that he had not yet been indicted for any conduct and that it was possible that when an indictment came down from the grand jury, it could be for any charge up to . . . aggravated murder. . . .
>
> I discussed at great length with Mr. Moore the definitions of "aggravated murder," "murder," and "felony murder." I did tell Mr. Moore that if he were charged with aggravated murder and if the jury decided that murder had been committed under [OR. REV. STAT. §] 163.095(e), in the course of or as a result of intentional maiming or torture, that it was not impossible that he might be convicted of aggravated murder . . . .

> I frankly believed if we went to trial he would be found guilty of assault, kidnapping, and murder (as was his codefendant, Roy Salyer, who chose trial as an option),[6] but I did not presume to tell Mr. Moore what he should do. I only told him what I thought the result would be of the various choices he had before him. I explained to Mr. Moore that if he chose not to accept the offer which the State had made to him, I expected that the district attorney would charge him with assault in the first degree, kidnapping, and murder,[7] and would go to trial on those charges. At no time during our association did I ever tell Mr. Moore what he should do. I only explained to Mr. Moore as carefully as I could what I thought the result would be of his actions if he chose one option or another.

A conviction of aggravated murder, of course, would have subjected Moore to the possibility of the death

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[6] Unlike Moore, Salyer chose to proceed to trial and was found guilty of murder, kidnapping, burglary, and assault. *See Salyer v. Belleque*, 2005WL 555403, at *1 (D. Or. March 4, 2005).

[7] Very strong circumstantial evidence contradicted Moore's "accidental shooting" explanation and would have justified an intentional murder charge. Moore shot Rogers with a revolver—a gun that would not discharge unless it had been cocked by the shooter. Furthermore, Rogers was shot in the temple, as if he was executed, and not in the back, as might be expected if he had slipped and fallen backward onto Moore.

penalty or life imprisonment without the possibility of parole. *See* OR. REV. STAT. § 163.105(1)(a). Given the strength of the evidence facing Moore, it is not surprising to learn that counsel and Moore decided to "attempt to secure the best possible resolution of the case" or that counsel, who had nearly three decades of criminal defense experience, thought the plea "was the best we could do under the circumstances."

These strong and obvious strategic reasons to take the plea and forego the suppression motion are protected under *Strickland*, *see* 466 U.S. at 681 ("[S]trategic choices must be respected in these circumstances if they are based on professional judgment."), especially because Moore was so obviously seeking "to save himself the expense and agony of a trial and *perhaps also to minimize the penalty that might be imposed.*" *McMann*, 397 U.S. at 767-68 (emphasis added). The majority's opinion sweeps all of these factors away. Had the majority been advising Moore at the time, they might have come to a different conclusion. But even accepting the majority's morning-after conclusion that counsel "misjudged the admissibility of the defendant's confession," *McMann*, 397 U.S. at 770, Moore is not entitled to habeas relief. *See id.* at 770-71.

The majority limits its consideration of counsel's explanation to a mere two paragraphs of the trial counsel's affidavit and refuses to consider many of the reasons that trial counsel gave for pursuing the plea bargain instead of going forward with a trial preparation strategy. The majority erroneously believes that trial counsel offered only two reasons to justify his

advice to Moore: (1) because he concluded Moore was not in custody at the time of the confession and (2) because Moore had given a full confession to two other people. *See* Maj. Op. at 9766-67, 9778, 9780, 9784-85 & n.12. The majority summarily concludes that there is no evidence that Moore wanted to press the case to early resolution and, therefore, trial counsel could not have made a reasoned strategic choice to not file the suppression motion so as "not . . . to upend plea negotiations." *Weaver v. Palmateer*, 455 F.3d 958, 972 (9th Cir. 2006); *see* Maj. Op. at 9784-85.

The extensive portions of the affidavit already quoted make clear that counsel's advice to forego the motion and take the plea was based on numerous considerations other than these two factors. *But see* Maj. Op. at 9785-88. And other portions of the affidavit demonstrate that plea negotiations were front and center in both Moore's and trial counsel's mind. Trial counsel reported that Moore indicated his willingness to testify against a co-defendant, which is surely the type of consideration defense counsel weighs during plea negotiations. Two entire paragraphs of the affidavit, paragraphs 13 and 14, discuss how Moore was more worried about the plea agreement that was offered to his brother, Lonnie Woolheiser, than he was about his own plea agreement.[8] Another entire paragraph establishes that trial counsel "discussed at *great length* whether it was in [Moore's] best interest

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[8] The affidavit indicates that trial counsel properly informed Moore that the offer to him was independent of the offer made to his brother.

to try to press the case to early resolution." (emphasis added). The majority's assertion that "there is no suggestion, let alone any evidence, that Moore expressed a desire to plead guilty and avoid trial, or to forego the filing of his meritorious suppression motion, prior to counsel's decision not to file [a suppression] motion," Maj. Op. at 9790 n.16, ignores the reality of the record evidence.[9]

This kind of meticulous, informed representation, provided by an attorney who had decades of criminal defense experience, does not "show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688; *McMann*, 397 U.S. at 767-71. More importantly for purposes of this appeal, the state court's decision that it did not constitute deficient representation was not an unreasonable application of clearly established federal law as determined by the holdings of the Supreme Court.

The majority's attempt to parse counsel's advice on whether to take the plea into two distinct decisions—first, whether to file a motion to suppress the confession, and second, whether to accept the offered plea bargain—reflects an almost willful ignorance of the record evidence and the realities of criminal defense representation. *See* Maj. Op. at 9784-90. As

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[9] Contrary to the majority's claims, *see* Maj. Op. at 9785-87, the record does not reflect whether the plea negotiations occurred before or after trial counsel advised Moore that a suppression motion would be unlikely to succeed or would otherwise be useless. The record does reflect that Moore wanted to press for an early resolution.

counsel's declaration makes clear, *see* Maj. Op. App. B, the decision not to file the suppression motion and the decision to take the plea necessarily informed each other. In fact, trial counsel's affidavit demonstrates that the two decisions—whether to file a motion to suppress and how to advise Moore on the plea—were made contemporaneously. Moore was never indicted, but he pled no contest to an information negotiated as part of the plea. Counsel simply could not have moved to suppress a confession at any time before the plea, unless the majority means to find counsel ineffective for not *threatening* to file such a motion in the plea negotiations.

The net effect of the majority's approach is pernicious: Instead of deciding whether counsel's conduct fell below an objective standard of reasonableness, the majority asks whether the motion had merit and collapses the entire first step of *Strickland* into the question of prejudice. *See* Maj. Op. at 9780 ("[O]ur inquiry with respect to deficient performance substantially overlaps with our inquiry regarding prejudice."). In doing so, it largely ignores the obvious strategic reasons detailed in counsel's affidavit that counsel had to advise Moore to take the plea, and the dispositive question becomes whether the motion to suppress had merit. Paired with the majority's unprecedented reading of *Arizona v. Fulminante,* 499 U.S. 279 (1991), *see* Maj. Op. at 9795-96 ("*Fulminante* stands for the proposition that the admission of an additional confession ordinarily . . . is therefore prejudicial."), which I address in detail *infra*, the implication is that *if* the motion had merit, then counsel was *obligated* to bring it, irrespective of any other

considerations or strategy. It forces defense counsel to file any motions to suppress a confession that a panel of federal judges later might determine to be meritorious, lest the court of appeals find that counsel "failed to recognize the clear merit of that motion" or "to assess properly the damaging nature of the tape-recorded formal confession." Maj. Op. at 9784.

The majority's application of the *Strickland* standard does not accord with the realities of defending a criminal defendant. Defense counsel must balance competing factors when selecting a defense strategy: for example, the likelihood of success on the motion to suppress, the likelihood of prevailing at trial given the other available evidence, the deal that the state is offering, the potential penalties that a defendant can avoid by taking an offered deal, and, of course, the defendant's own wishes. *Strickland* gave "wide latitude" to counsel to avoid unhelpful judicial nosiness in plea negotiations:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89. A requirement that defense counsel file any potentially meritorious pretrial motions or risk being found incompetent on collateral review will skew plea negotiations where the

considerations promoting negotiation include whether the defendant will file a motion to suppress. If, in response to the majority's new rule, counsel must file all motions, defense counsel loses a bargaining chip and will almost certainly face a much less cooperative prosecutor. And if defense counsel loses the motion to suppress, counsel will be in a much weaker bargaining position when he returns to the negotiation table. In those cases, the post-motion deal will nearly always be worse than the pre-motion deal.[10]

The majority would leapfrog over all of those considerations—if the motion to suppress had merit, then counsel *must* bring it (even if counsel does not think it will serve the client's best interests). *Strickland* and its progeny simply do not allow this new presumption of deficient conduct whenever a potentially "meritorious" suppression motion might have been filed—least of all in habeas proceedings governed by AEDPA.

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[10] Moreover, if, as the majority effectively holds today, defense counsel must always move to suppress a confession or risk a claim of ineffective assistance of counsel, there is no end to the second-guessing game. If counsel moved to suppress and lost on that motion, then, by the majority's reading, counsel must see the case through trial and take an appeal. And if he loses on appeal, then he must file for habeas—all so that he can be in the best position to negotiate a plea bargain. The bottom line is that counsel, in defense of his own reputation, will not seek plea agreements or will counsel against accepting a plea bargain. This makes no sense.

In short, I cannot agree with the majority that counsel's thorough representation constituted deficient performance. Even assuming the involuntariness of Moore's confession, counsel gave a detailed explanation why pursuing the plea was in Moore's strategic interest. We can second-guess counsel's decisions, but we have no basis for concluding that those decisions were constitutionally deficient, let alone that clearly established Federal law, as announced by the Supreme Court, compels such a finding.

II. WHETHER COUNSEL'S CONDUCT PREJUDICED MOORE

Even if Moore's counsel was ineffective, Moore is only entitled to habeas relief if he can demonstrate that he has suffered prejudice as a result. Unlike the majority, however, I do not believe that Moore has demonstrated prejudice. To demonstrate prejudice under *Strickland*, 466 U.S. at 694, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *In Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985), the Supreme Court applied *Strickland* "[i]n the context of guilty pleas" and held that "to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 58-59.

There is no reason to believe that Moore would have gone to trial. In fact, the state's case against Moore was so strong that it would have been irre-

sponsible for counsel to lead Moore into thinking he might have gotten a better deal from a jury than he received from the DA. As I explain here, by declining the plea of felony murder and taking the mandatory minimum of twenty-five years, Moore risked getting a life or even a death sentence.

A. *The Evidence Against Moore*

A straightforward application of the *Hill* standard demonstrates that Moore cannot establish that he has suffered any prejudice.[11] This conclusion flows from two simple facts. First, the state could have called Raymond and Ziegler to testify that Moore confessed his role in the kidnapping and slaying of Kenneth Rogers. We do not need to fret much about what Raymond Moore would have testified had he been called at trial, as the majority does, *see* Maj. Op. at 9773-74; *id.* at 9797 (suggesting Raymond and Ziegler "would undoubtedly be reluctant to do unnecessary harm to [Moore's] case"); *id.* at 9799 ("[I]t is far from clear what [Raymond and Ziegler] would have said or to what extent their testimony would have been persuasive to a jury . . . ."); *id.* at 9799 ("Critically, the state court made no findings as to the contents of what Moore had told Raymond or Ziegler or what details they might have been able to recount at trial."), because the record contains Raymond's testimony at

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[11] Judge Berzon argues in her concurrence that Moore had the option of meeting the prejudice standard under either *Strickland/Kimmelman* or *Hill* and, further, that he meets both of those standards. *See* Concurring Op. at 9824-25. I address her arguments in Part II.C, *infra*.

the state court post-conviction evidentiary hearing. In it, Raymond confirms that, before he took his brothers to the police station where their confessions were recorded, Moore confessed to him the details of what happened. Here is how Raymond described it, under oath, to the state court:

> [W]hen [Roy Salyer] got back from Texas and dis-covered [that Rogers had burglarized Salyer's home, Salyer] showed up over at Lonnie [Woolhiser's] house where Randy [Moore] was that morning and . . . there was a couple cases of beer and started drinking and basically, to my understanding . . . instigated them into going up and, as they put it, spanking their other friend because friends do not rob friends. And in the process of this, I guess, to make an example and put some scare into Mr. Rogers so he did not do this thing again, they had blindfolded him to duct taped him and put him in the trunk of the car and took him out to a place that's a little remote, not a lot. The gentleman was a large size guy and didn't walk much and stuff. And their intent was to leave him there and make him walk home, you know, after he freed himself. This here, of course, is the kidnapping that's involved in this case because they took him somewhere against his will . . . . [D]uring this period of time, Lonnie who is a little rowdier—he's a good boy but he's just a little rowdy. He'll fight at the drop of a hat. He had in his possession a .22 magnum pistol in which Mr. Rogers had given to him previously—given or traded, I'm not sure which.

> And Randy, while they were pushing Mr. Rogers up the hill, kind of muddy, it's during the winter and we have a lot of red mud down there, Randy had taken the revolver from Lonnie and at the time he had taken it, Mr. Rogers had slipped backwards on the mud and the gun discharged. I'm not sure of all the exact details because this is basically hearsay. It's what was stated in court *and it's what they had basically told me after the incident, too, before I took them in, or on the way in*.

(emphasis added). The majority thus is disingenuous in stating that "[t]he state court found only that Moore had 'confessed' to" Raymond and Ziegler but did not make specific findings concerning the content of that confession, Maj. Op. at 9774, particularly because trial counsel's affidavit—which the state court credited—stated that Moore had made a "full confession to his brother and to Ms. Ziegler." The record clearly showed that Raymond, at least, knew what happened because Moore told him about the details. With this testimony, the state court reasonably concluded that any failure on the part of trial counsel would not have resulted in prejudice to Moore. Trial counsel, the state court, and the district court all recognized that Raymond could have testified about what Moore told him concerning the murder. In its selective treatment of the record, the majority irresponsibly ignores this testimony.

Second, even without his confession to Raymond and Ziegler, the state's case against Moore would likely have been airtight. I emphasize that the case

"would likely have been airtight" because counsel had to judge the strength of the state's case before the state put it on. Nevertheless, as I show, the case for felony murder was not a difficult one at all.

Under section 163.115 of the Oregon Revised Statutes, Rogers's killing was a felony murder if "it [was] committed by a person, . . . who commit[ted] or attempt[ed] to commit [kidnapping or assault] and [the death occurred] in the course of and in furtherance of the crime the person [was] committing or attempting to commit." It is undisputed that Moore, Salyer, and Woolhiser went to Rogers's home, that Rogers was beaten, that he was bound with duct tape, and that he was thrown into the trunk of the car they had borrowed, driven to a remote location, and shot in the temple. It is indisputable that Moore, Salyer, and Woolhiser, by virtue of their involvement in the felonies of kidnapping and assault, were guilty of felony murder under Oregon law. It is equally indisputable that Moore had no affirmative defense. Thus, to convict Moore of felony murder, all that the state needed to do was prove that he took part in Rogers's kidnapping and that the murder furthered the kidnapping.

This would not have been hard. The state had both Roy Salyer and Lonnie Woolhiser in custody, and both could have been called to testify that Moore took part in the attack. The state court found that Moore and Woolhiser had also confessed to their older brother Raymond Moore as well as to Woolhiser's

girlfriend, Debbie Ziegler.[12] Since all of these witnesses were Moore's close relatives or good friends, their testimony would likely have been very credible.

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[12] The majority spends a great deal of time discounting the value of these two confessions by speculating on what the witnesses would or would not have done. It finds that "Raymond would likely have been a hostile witness" and that "it is unlikely that [the state] would have been able to elicit much of the information it desired from him." Maj. Op. at 9799 & n.24. This is raw speculation, and it is belied by the testimony Raymond actually provided to the state court. It is also patently absurd. Because the broad outlines of what happened were very clear *i.e.*, that Rogers was beaten in his home, bound, kidnapped, taken to a remote location and shot in the head while still bound—the state needed to establish very little to convict Moore of felony murder. Focusing on statements made by Ziegler during Moore's initial questioning, the majority states that "there is little evidence that Ziegler could have contributed anything." Maj. Op. at 9799-9800. But the state court did not rest its finding that Ziegler could have repeated Moore's confession solely on the statements she made at questioning. The state court *explicitly* found that Moore's trial counsel's affidavit, including the paragraph explaining that no motion to suppress was filed because Ziegler or Raymond Moore could have been called to testify, was truthful. As already noted, *see supra* at 9843-44, the affidavit clearly states that Moore admitted to making a full confession to Ziegler. Contrary to the majority's assertions, *see* Maj. Op. at 9799-9800 & n.24, the state court's ruling that Moore confessed to Ziegler did not conflict with the interrogation transcript: Just because Ziegler learned of the murder on the day *of* the interrogation does not mean that she learned of it *at* the interrogation.

And yet this only scratches the surface of the damning testimony available to the prosecution. Before they left for Rogers's residence, Salyer, Moore, and Woolhiser had been drinking with others at Ziegler's residence. Salyer was "ranting and raving" about how Rogers had broken into his cabin and slashed his tires. This was what prompted the trio to head to Rogers's residence—to confront him about the robbery and to scare him out of ever committing another one. *Four* witnesses, including Ziegler, observed this entire interaction and then observed the trio drive off to confront Rogers—in a car that Salyer had borrowed from another one of the guests.

When the trio arrived at Rogers's residence, other people were there. These people witnessed Moore, Woolhiser, and Salyer arrive, and at least one of those people spoke with Woolhiser about what they were doing there. Another was able to identify all three defendants from a photo lineup. These people would also have been able to testify that at this point the car's license plates had been covered over with duct tape. Shortly after the defendants arrived, these

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I find it remarkable that the majority, twelve years after the incidents in question, and without knowing any of the parties involved, can divine what Raymond and Ziegler were thinking and what they would or would not have done. I also find it remarkable that the majority brushes aside, with almost no discussion, the state court's factual findings concerning these confessions.

people all drove away, leaving Rogers alone with Moore, Woolhiser, and Salyer.[13]

There was also highly inculpatory physical evidence in this case. The day before Moore confessed, Salyer led police to the location of the revolver they had used. The police were unable to find it in the dark, but Woolhiser led them back to the same area the next day, at which point they recovered the weapon. When police found the car that the trio had used, they found blood in the trunk, as well as hair. Although the record does not state that either the blood or the hair was ever scientifically tested, a visual inspection of the hair suggested that it may have been the victim's, who had long hair that he wore in a ponytail.

So, to summarize, *even without Moore's confession to the police, or his confession to Raymond Moore or*

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[13] With the exception of the lineup identification, the prosecution could establish *all* of the facts in the last two paragraphs by relying solely on statements made by Moore, the admissibility of which has never been questioned. The day before the interrogation at issue in this case, the police approached Moore and Woolhiser while they were eating at a local restaurant, and the pair agreed to come by the station house and answer questions after they had finished their dinner. After arriving at the station house, Moore gave a description of events that was largely accurate up until the point that Woolhiser and Salyer began beating Rogers. The next day, Woolhiser admitted to asking the owner of the car if he had anything that they could use to tie Rogers up, to which the owner responded that he had some duct tape.

Debbie Ziegler, or the testimony of his co-defendants, the prosecution had testimony from *multiple* witnesses, as well as unchallenged statements from Moore, that: (1) An intoxicated Salyer had been ranting and raving about how Rogers had stolen from his cabin and slashed his tires; (2) Moore had left with Salyer and Woolhiser to confront Rogers; (3) the trio arrived at Rogers's residence, and that soon thereafter they were alone with Rogers; and (4) the trio returned from Rogers's residence together. Rogers was found murdered the next day. Woolhiser and Salyer were clearly involved, as they knew where the gun was, and blood and hair were found in the trunk of the car that the trio had borrowed. The police could prove that Moore had lied about what had transpired when he went to Rogers's residence. Add the testimony of Raymond and Ziegler, and the case is airtight. The state's felony murder case against Moore could hardly have been any stronger unless the murderers had brought along a camera crew.

Moreover, the evidence was such that Moore could have been tried for a variety of other crimes instead of or in addition to felony murder. Had Moore not pled to felony murder, the DA could have tried Moore for aggravated murder, which carries a sentence of life imprisonment, life imprisonment without the possibility of parole, or death. *See* OR. REV. STAT. §§ 163.095(1)(e), 163.105. Likewise, Moore could have been tried for other types of criminal homicide, any of which would carry a sentence of life imprisonment. *See id.* § 163.115(5)(a). In addition to the homicide charge, Moore could and likely would have also been charged with other crimes, including kidnapping. Fi-

nally, the possibility of Moore's being charged with such crimes was forefront in counsel's mind when he discussed the plea with Moore. As counsel testified:

> We discussed at length the felony murder rule. We also discussed at length the fact that he had not yet been indicted for any conduct and that it was possible that when an indictment came down from the grand jury, it could be for any charge up to . . .aggravated murder. . . .
>
> I discussed at great length with Mr. Moore the definitions of "aggravated murder," "murder," and "felony murder." I did tell Mr. Moore that if he were charged with aggravated murder and if the jury decided that murder had been committed under [OR. REV. STAT. §] 163.095(e), in the course of or as a result of intentional maiming or torture, that it was not impossible that he might be convicted of aggravated murder . . . .

All of this evidence—the witnesses, the duct tape, the gun, Moore's confession to others—were known to Moore and his counsel. They knew what the majority cannot fathom—that the state had a rock-solid case against Moore and his best shot was to strike a plea deal. However, the majority's formal opinion completely fails to consider almost *any* of this evidence or its implications for the deal Moore struck. *See, e.g.*, Maj. Op. at 9814 ("Without the fruits of Moore['s] . . . confession[ ], the prosecution would have had tremendous difficulty meeting the high burden it faced. In view of the weaknesses in the state's case, it is highly unlikely that, in the absence of his own re-

corded confession, Moore would have pled to felony murder. We thus cannot have any confidence that the outcome would have been the same had counsel filed a motion to suppress.").

In parts of the majority's formal opinion as well as its appendix, the majority also criticizes my reading of the record; these criticisms lack force. For example, the majority questions my placing any reliance on the testimony of Salyer and Woolhiser, "without any evidence in the record as to the substance or availability of such testimony, or, even more important, its *admissibility*," Maj. Op. at 9803 (emphasis in original),[14] in contrast to its own reliance on "the arguments made by the state on appeal," *id.* at 9802-03. First, it is Moore, not the state, who bears the burden of establishing that he has suffered prejudice; his failure to address evidence in the record does not entitle us to ignore it in making our decision. It is utterly absurd for us to put on blinders and pretend that obviously damning evidence—such as the testimony of codefendants who have pled guilty—simply does not exist.[15] Indeed, Moore himself does not expect us to

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[14] This criticism seems particularly strange in light of the extensive discussion that the majority provides of why, in its opinion, Ziegler and Raymond would not have made good prosecution witnesses. *See, e.g.*, Maj. Op. at 9796-98; *see also supra* at 9853 n.11.

[15] The majority's criticism on this score seems all the more hypocritical because it has no hesitation, apparently, in manufacturing new arguments on behalf of Moore, who did not cite on appeal the two cases most important to the majority's opinion, *Kimmelman* and *Fulminante*, or make

do so; he specifically addresses the issue of Salyer's testimony in his brief. Second, the record leaves little doubt that Salyer and Woolhiser's testimony would have been admissible, available, and adequate: Both Salyer and Woolhiser were imprisoned by the State of Oregon, so they could easily be produced if necessary.[16] As to the substance of their testimony, even if it were not as complete as their formal confessions to police, had Moore been on trial for *felony murder*, the

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any argument related to the theories on which the majority bases its decision. *But see* Maj. Op. at 9805 ("The forfeiture rule (sometimes erroneously called the waiver rule) applies equally to arguments, factual assertions, and legal theories that were not urged below."). To borrow from the majority opinion, I "recognize that [my] colleague[s] believe[ ] that Moore deserves to [get a less harsh penalty], but disregarding the [appellate] arguments as well as the state court record and findings, and substituting one's own, is hardly the manner in which federal appellate courts are supposed to determine appeals," Maj. Op. at 9768 n.1, and "[w]e may not as appellate judges manufacture such arguments from scratch, especially where, as here, the facts in the record are directly contrary to the theory we are seeking to create on behalf of one of the parties," Maj. Op. at 9791.

[16] The majority's inadmissibility argument—an argument that Moore himself only makes in passing and, even then, only with reference to Salyer—fails for the same reason. The majority's claim that any of the evidence I cite above flowed from "Woolhiser's involuntary confession[ ]," Maj. Op. at 9811, and is therefore inadmissible is simply wrong because Woolhiser could have been called to testify directly.

state needed to prove precious few details of the day's events to secure a conviction.[17]

But the most important point is this: Where we are reviewing the state court's denial of an ineffective assistance of counsel claim, it would be irresponsible for us not to review the record to apprise ourselves of what *counsel* likely knew. We can only speculate as to what testimony the witnesses actually would have offered had this case actually gone to trial. But it is naive for us to ignore the other evidence in the record.

The majority's opinion correctly quotes the applicable standard of prejudice for ineffective assistance of counsel claims arising from guilty pleas: the petitioner must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. The Supreme Court reaffirmed *Hill* in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), stating:

> [i]n *Hill*, we considered an ineffective assistance of counsel claim based on counsel's allegedly deficient advice regarding the conse-

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[17] The majority cites *Lee v. Illinois*, 476 U.S. 530, 545 (1986), for the proposition that testimony by co-defendants is "inherent[ly] unreliab[le]." *See* Maj. Op. at 9775 n.4. This citation is misleading both because *Lee* involved application of hearsay law, which is not implicated by Salyer and Woolhiser's potential testimony, and because it relied on *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), which is no longer good law. *See Crawford v. Washington*, 541 U.S. 36 (2004).

> quences of entering a guilty plea. Like the decision whether to appeal [presented here], the decision whether to plead guilty (i.e., waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled.

Id. at 485. The Court proceeded to cite *Hill* for the proposition that "when, in connection with a guilty plea, counsel gives deficient advice regarding a potentially valid affirmative defense, the prejudice inquiry depends largely on whether that affirmative defense might have succeeded, leading a rational defendant to insist on going to trial." *Id.* at 486.

The majority's position, then, is that there is a reasonable probability that, but for his counsel's failure to move to suppress the taped confession, Moore would not have pled to felony murder, but instead would have insisted on going to trial. The majority speculates that it is likely the state would have been unable to secure a plea bargain with "only" the two confessions and other evidence catalogued above.[18] In

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[18] The majority claims that if Moore's taped confession had been suppressed, the state may have offered Moore a better plea bargain. Maj. Op. 9802 n.26. This possibility is both unlikely and irrelevant. Considering the weight of the evidence, it is speculative and unlikely that the state would have offered Moore a different plea bargain had one of multiple confessions been suppressed. Moreover, the lost possibility of negotiating a more favorable plea bargain, which I do not believe exists here in any event, does not constitute prejudice under any Supreme Court author-

support of this proposition, the majority points out that we don't know with certainty what Raymond and Ziegler would have testified to at trial, so we can't know that their testimony would have been sufficient to cause Moore to accept a plea bargain. Maj. Op. at 9799-9800.

Moore's counsel did not have the benefit of the majority's *ipse dixit* power; when advising Moore on the plea offer, he had to judge his case on the basis of the evidence he thought the state had and the likelihood of various witnesses testifying. No one knows with prescient certainty how a trial will play out, so a defendant and his counsel must weigh their options and decide whether the certainty of a plea is preferable to the gamble one takes by being tried.

The majority also makes much of the fact that Salyer went to trial and received the same sentence as Moore did from his plea bargain: twenty-five years.[19] Maj. Op. at 9788, 9789 n.15, 9802. This simply is not relevant. First, Moore's counsel did not

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ity. The Supreme Court has held unequivocally that "in order to satisfy the 'prejudice' requirement, the defendant must *show* that there is a reasonable probability that, but for counsel's errors, he *would not have pleaded guilty and would have insisted on going to trial*." *Hill*, 474 U.S. at 59 (emphasis added).

[19] Salyer was sentenced to twenty-five years for murder, ninety months for kidnaping, seventy months for assault, and twenty-two months for burglary, all of which ran concurrently. *See Salyer v. Belleque*, 2005 WL 555403, at *1 (D. Or. 2005).

have the benefit of this knowledge at the time he was discussing the plea bargain with Moore. Additionally, one cannot infer with any certainty how one defendant will fare in a trial from how a different defendant fared. And, Salyer is not a good test case of what would have happened had Moore gone to trial because Salyer was not the one who pulled the trigger; it was Moore who marched Kenneth Rogers up the hill and it was Moore who held the gun that shot Rogers through the temple. Thus, there is every reason to expect Moore to be susceptible to more serious charges and a harsher sentence and little reason to think that Moore would be charged only with the same crimes as Salyer. Maj. Op. at 9789 n.15. Moreover, the majority uses Moore's and Salyer's similar sentences as evidence of the raw deal Moore got by accepting a plea bargain. However, Moore's plea bargain of twenty-five years is no harsher than the sentence Salyer received. If Salyer's fate suggests anything, it is that, at the least, Moore did no worse by accepting the plea bargain than he would have done by going to trial. The majority claims that Moore suffered prejudice because a less culpable coconspirator, who did not pull the trigger, received the same sentence. Maj. Op. at 9811. How this constitutes prejudice is beyond me.

This much is clear: There was more than enough admissible evidence, easily obtainable by the state, to convict Moore of (at least) felony murder—especially and most importantly, as the state court recognized, the likely testimony of Raymond Moore and Debbie Ziegler. When we consider the surfeit of evidence against Moore, it is plain that not only was counsel's

advice to accept the plea not deficient or prejudicial, but it was very good advice. Moore may not have received a lesser sentence than his codefendant who went to trial, but he did avoid a potential death sentence. There is good reason why *Strickland* requires us to defer to counsel's on-the-ground judgments over the majority's own " '*post hoc* rationalization.' " Maj. Op. at 9791 (quoting *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003)). In short, there is no reason to think that removing one brick in the state's wall of evidence would have caused Moore to subject himself to a high-stakes trial and therefore no reason to conclude that he suffered any prejudice.

B. *The Majority's Reliance on* Fulminante

Ultimately, the majority opinion rests on the premise that the state court's decision resulted in an unreasonable application of *Arizona v. Fulminante*, 499 U.S. 279 (1991), *a case*, I note once again, *that Moore does not even cite*. According to the majority, "*Fulminante* stands for the proposition that the admission of an additional confession ordinarily reinforces and corroborates the others and is therefore prejudicial." Maj. Op. at 9796-97. *Fulminante* does no such thing. It did not, as the majority's characterization suggests, adopt a per se rule that the improper admission of a confession is prejudicial;[20] in fact,

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[20] The majority attempts to conceal its mischaracterization of *Fulminante*, assuring its readers that it does not adopt a per se rule that improperly admitted confessions are prejudicial. Maj. Op. at 9796 n.20. That is a remarkably contradictory claim to make, as footnote 20 of the majority's opinion is appended to a sentence that says, "*Ful-*

Fulminante explicitly held that the improper admission of a confession is subject to harmless error analysis. *See* 499 U.S. at 310. Nor does the fact that the Supreme Court found that the admission of the confession at issue in *Fulminante* was prejudicial compel the same result here.

The fact that Moore's confession to the police was probative does not make it prejudicial. Indeed, it is fair to say that the formal, tape-recorded confession that Moore gave to police in their interrogation room was probably more probative than Fulminante's confession, which he made to a friend while they were both incarcerated. All of the quotations that the majority pulls from *Fulminante* to establish the damaging, probative value of a confession—that "[a] confession is like no other evidence," Maj. Op. at 9798 (alteration in original), that a "defendant's own confession is probably the most probative and damaging evidence that can be admitted against him," *id.*, that "[t]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct," *id.*—are statements that were originally made by the *Fulminante* Court about confessions like those Moore made to Raymond and Ziegler *i.e.*, those that are made to third parties who then testify about them in court. Thus, *Fulminante* does not suggest—let alone *hold*—that Moore was prejudiced because his confes-

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minante stands for the proposition that the admission of an additional confession ordinarily . . . is therefore prejudicial." Maj. Op. at 9796. If that sentence does not adopt a per se rule, it comes dangerously close.

sion to police was not suppressed. In fact, it supports the exact opposite conclusion—that Moore's two confessions to Raymond and Ziegler were already so damaging to his case that the admission of his confession to police would do him no further harm. By the majority's own logic, Moore's confessions to Raymond and Ziegler were "like no other evidence" and were "probably the most probative and damaging evidence . . . against [Moore]." Maj. Op. at 9798.

The majority tries to avoid the implications of its own argument by comparing the relative value of Moore's confession to the police with his confession to Raymond and Ziegler. The majority states that "Moore's lawyer . . . thought that the taped confession was not prejudicial because Moore had told his brother and his half-brother's girlfriend about the crime." Maj. Op. at 9766. According to the majority, "[s]uch a formal confession would, without question, be far more persuasive to a jury than Moore's statements to two lay witnesses." *Id.* at 9796. The majority concludes that the state courts' "determination that the taped confession was harmless was contrary to clearly established Supreme Court law as set forth in *Fulminante*." *Id.* at 9808; *see also id.* at 9794 ("[The state court's] determination that counsel's failure to suppress the formal taped confession was not prejudicial because Moore had previously told his relative and a relative's girlfriend about his participation in the killing of the victim was contrary to clearly established Supreme Court law."). In the majority's mind, the question under *Fulminante* comes down to "determining whether the difference between the weight of Moore's statements to his brother and his half-

brother's girlfriend and his formal taped confession to the police is such that the exclusion of the latter undermines our confidence that Moore would have entered into so harsh a plea agreement." Maj. Op. at 9807. This approach misstates the law in at least two ways.

First, *Fulminante* says nothing about determining the relative weight of the two confessions. Rather, it says that harmless error analysis applies to determine whether an erroneously admitted confession is harmless. *Fulminante*, 499 U.S. at 308. The *Fulminante* Court found the admission of the first confession not to be harmless, not because it was more weighty than the second one, but because of a unique relationship between the two confessions—the veracity of the second was bolstered by the existence of the other. *Id.* at 298-300. Here, no such relationship exists.[21]

Second, *Fulminante* concerned the application of harmless error after a trial had taken place, not after a guilty plea had been entered, as here. The question under clearly established Supreme Court precedent is thus not whether we are confident that Moore "would have entered into so harsh a plea agreement," Maj. Op. at 9807, but whether Moore can show that, but for the failure to file the suppression motion, Moore would not have pled but would have insisted on going to trial. No other standard of prejudice is clearly es-

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[21] The majority's accusation that, under my logic, *Fulminante* "would have come out the opposite way," Maj. Op. at 9801, is thus flatly incorrect.

tablished Supreme Court law in the guilty plea context. *See Hill*, 474 U.S. at 58-59. *But see* Maj. Op. at 9799 ("[T]he record falls far short of establishing that the potential testimony of Raymond and Ziegler would have been sufficient to cause Moore to accept so harsh a plea agreement . . . ."); *id.* at 58 ("[W]e are left only with determining whether the difference between the weight of Moore's statements to his brother and his halfbrother's girlfriend and his formal taped confession to the police is such that the exclusion of the latter undermines our confidence that Moore would have entered into so harsh a plea agreement."). If we were dealing with a jury verdict, the majority's objection that a "confession is probably the most probative and damaging evidence that can be admitted against [Moore]" would carry more force because "it is impossible to know what credit and weight the jury gave to the confession." *Fulminante*, 499 U.S. at 292 (White, J., dissenting) (internal quotations and citations omitted). But we are dealing with a plea bargain here. The question is whether a reasonably competent attorney would have advised Moore differently when faced with this evidence, and, if so, whether that would have led Moore to go to trial instead of pleading guilty.

Yet even if we assume *Fulminante* applies, its facts are so different from those presented here that it is absurd to suggest that it supports the proposition that the state court's determination violated clearly established federal law. Fulminante was convicted of murdering his eleven-year-old stepdaughter. He made two confessions: one to Anthony Sarivola, a fellow inmate who befriended him, and another to

Donna Sarivola, Anthony's wife. Fulminante had no accomplices, and "the physical evidence from the scene and other circumstantial evidence would have been insufficient to convict." *Fulminante*, 499 U.S. at 297. Thus, unlike here, where the case against Moore was exceptionally strong even without his confessions, "both the trial court and the State recognized that *a successful prosecution depended on the jury believing the two confessions.*" *Id.* (emphasis added). The question before the Supreme Court was whether Fulminante was prejudiced by the improper admission of the first confession at trial in light of the properly admitted second confession. The Supreme Court found that Fulminante suffered prejudice because, under the unique circumstances of that case, the jury likely would not believe that the second confession (to Donna Sarivola) had been made if it had not already heard about the first confession (to Anthony Sarivola). *See id.* at 298-300.

The facts of *Fulminante* are simply not analogous to those presented here. Moore's confessions do not need the same kind of background explanation that Fulminante's confession to Donna Sarivola required because Raymond and Ziegler were not strangers to Moore in the way that Donna Sarivola was to Fulminante. Under the circumstances, it only made sense that Fulminante would have confessed to her if he had already confessed to her husband. Moore's confessions to Raymond and Ziegler *preceded* his confession to the police, and the confessions were not linked in the same way that Fulminante's confessions to the

two Sarivolas were.[22] Moore confessed to his older brother Raymond because Raymond himself had once been in a similar situation and Moore wanted his advice. Ziegler and Moore were good friends; he was at her house with her before he left to confront Rogers, he returned to her house afterwards, and he was at her house when Rogers's murder was reported in the news. Moreover, Raymond and Ziegler did not have the same incentives to lie that Donna Sarivola did. Also unlike *Fulminante*, here there was other evidence—for example, the duct tape used to bind Rogers, and the blood and hair found in the trunk—to

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[22] On the contrary, the confessions in this case bear far more resemblance to the confessions in *Milton v. Wainwright*, 407 U.S. 371 (1972), the case that the *Fulminante* Court cited as an example of a case where confessions were made independently of each other. The challenged confession in *Milton* was made to a police officer who was posing as a fellow murder suspect incarcerated with the defendant. The defendant had previously made three separate confessions that were not related to the confession he made in prison, other than in the sense that the confessions all corroborated each other. *Id.* at 372-73. To the extent that the majority distinguishes *Milton* because Moore's confession at issue was his only formal confession, it misses my point. *See* Maj. Op. at 9797 n.21. The *Fulminante* Court held that admission of the confession was prejudicial, even though a second confession was also admitted, because the credibility of each confession was strongly related and each could easily be attacked independently. This was not the case in *Milton*, and, accordingly, the Court did not find prejudice; similarly, it is not the case here.

corroborate the details of the testimony that Raymond and Ziegler would have given.[23]

Finally, regardless of how *Fulminante* is read, it certainly does not hold that an attorney who declines to file a motion to suppress the challenged confession in favor of advising his client to take a plea on the basis of the presence of the second confession—which the *Fulminante* Court acknowledged was admissible, *see Fulminante*, 499 U.S. at 298, 300, 302—has provided ineffective assistance.

I close by returning to a common theme of my dissent. I do not believe that the majority's reading of *Fulminante* is correct. However, even if I am wrong and the majority is correct, under AEDPA this is not enough to permit us to grant Moore habeas relief. We

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[23] The majority claims that *Anderson v. Terhune*, 516 F.3d 781 (9th Cir. 2008) (en banc), supports its remarkable reading of *Fulminante*. *See* Maj. Op. at 9801-02. It cites *Anderson* for the proposition that a habeas court applying *Fulminante* need "not . . . consider the other evidence the state had presented to tie the defendant to the crime, or whether the confession would have repeated such evidence." Maj. Op. at 9801. That is an inappropriate reading of *Anderson*, which simply did not discuss any of the additional evidence that was present before the state court. Its entire discussion of prejudice is basically a single sentence: "The confession was central to the conviction." *Anderson*, 516 F.3d at 792. *Anderson* provides no support for the majority's broad reading of *Fulminante*. If the majority's reading of Anderson and *Fulminante* is correct, it would swallow the *Fulminante* rule that harmless error analysis applies to erroneously admitted confessions.

may only do so if the state court's decision was contrary to any law that was "clearly established" by the Court in *Fulminante*. The majority's reading simply does not meet this standard.

C. *The Concurrence's Prejudice Standard*

Judge Berzon's concurring opinion argues that Moore could choose to satisfy the *Strickland* prejudice prong either under *Hill* or directly under *Strickland* as applied through the lens of *Kimmelman*. *See* Concurring Op. at 9824-25. However, Judge Berzon views the *Kimmelman*/*Strickland* framework as more appropriate for resolving this case because *Hill* governs prejudice determinations in plea bargains concerning counsel's advice on whether to take the plea, after "motions practice and discovery have set the legal landscape." *Id.* at 9825. On the other hand, *Strickland* and *Kimmelman*, in her view, "deal with counsel's failure to *create* a proper legal landscape—by, [for example], failing to file a plainly meritorious suppression motion." *Id.* at 9825. Judge Berzon concludes that the *Kimmelman* standard, applied in the plea context, permits prejudice to be established by showing that had defense counsel properly shaped the legal landscape prior to the plea proceedings, the defendant might have obtained a more favorable plea bargain from the prosecutor. *Id.* at 9827. The distinction she attempts to draw is precluded not only by *Hill* itself, but also by the vast weight of precedent in both the courts of appeals and the district courts. Her "legal landscape" argument is interesting but it has never been "established," much less clearly established, by the Supreme Court. It also raises substan-

tial concerns about federalism and separation of powers.

The concurrence's critical mistake is its failure to consider fundamental principles governing the appeal of guilty pleas. A criminal defendant who has entered a plea generally waives his right to challenge defects in the pre-plea proceedings. Instead, a defendant who has entered a plea "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [*v. Richardson*, 397 U.S. 759, 770-72 (1970)]." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *see also McMann*, 397 U.S. at 770-71 ("Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends . . . not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases."); *Ortberg v. Moody*, 961 F.2d 135, 137-38 (9th Cir. 1992) ("Petitioner's nolo contendere plea precludes him from challenging alleged constitutional violations that occurred prior to the entry of that plea." (citing *Tollett*, 411 U.S. at 266-67)).

With that fundamental principle of pleas in mind, it becomes obvious that *Hill* provides the only appropriate standard for evaluating claims of ineffective assistance in the plea context. The only thing that

can be challenged after a plea is the advice to enter a particular plea, for all other defects are waived by the plea. To be sure, *Strickland* is not irrelevant to the analysis under *Hill*; the *Hill* Court explicitly adopted the *Strickland* standard in the context of guilty pleas. "We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58. But the process of applying *Strickland* to guilty pleas was set forth in *Hill*, and there is no reason to use a different prejudice analysis than that established in *Hill*.

In *Hill*, the Court wrote that "[i]n many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Id.* at 59. "[W]here the alleged error of counsel is a failure to investigate . . ., the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that . . . [counsel] would have . . . change[d] his recommendation as to the plea." *Id.* But this inquiry only goes to the question of whether the advice to enter the plea caused prejudice—i.e., whether the defendant would not have pled guilty with better advice—not whether the prosecution might have offered a different plea agreement. Put differently, even accepting Judge Berzon's proposed distinction between the advice to enter a plea and the process of creating the legal landscape in which plea bargaining occurs, if a defendant still would have pled guilty or nolo contendere despite trial counsel's unprofessional errors in crafting the

legal landscape in which the plea was entered, then there is no constitutional prejudice.

Judge Berzon's response that *Hill* did not deal with the creation of pre-trial landscapes while *Kimmelman* did, *see* Concurring Op. at 9827-28, only highlights why the *Hill* standard is the correct one. Under *Hill*, if it was reasonable to advise a defendant to take a plea, there is no deficient conduct. If counsel has been unreasonable in giving that advice, then we proceed to ask whether the defendant would have taken the plea anyway. In other words, Judge Berzon's concerns about the pre-plea landscape are adequately addressed in the first step of *Hill*.

There is good reason for us to follow *Hill* in these circumstances. Judge Berzon would have us consider the "legal landscape" and ask whether "the plea bargain outcome would have been improved upon the filing of the meritorious suppression motion that was not filed because of ineffective assistance of counsel." Concurring Op. at 9828-29. We have no way of evaluating whether the prosecutor, having been forced to answer the motion to suppress, would even be willing to offer a new plea bargain, much less whether the prosecutor would have offered an "improved" "plea bargain outcome." *Id.*

Given the multiplicity of factors that a prosecutor must consider when offering a plea bargain, it is highly doubtful that a federal court, reviewing a state prosecutor's decision to offer a particular plea bargain, even has the tools necessary to decide what bargaining posture a prosecutor would take in the face of a hypothetical motion to suppress. When deciding

what plea bargain to offer a particular criminal defendant, for example, a prosecutor might consider the willingness of the defendant to cooperate, the defendant's past criminal history, department resources, and pressure from the public in high profile or emotionally charged cases. *See Wayte v. United States*, 470 U.S. 598, 607 (1985); *see also United States v. Estrada-Plata*, 57 F.3d 757, 760 (9th Cir. 1995) ("[T]here is no constitutional right to a plea bargain, and the decision whether to offer a plea bargain is a matter of prosecutorial discretion." (citation omitted)). To further complicate Judge Berzon's proposed counterfactual analysis, all of this secondguessing will be conducted, in most cases, years after the decision to offer the challenged plea bargain. Political winds may have shifted or a new prosecutor may have taken office. Permitting a habeas petitioner to demonstrate prejudice simply by showing that a different plea bargain might have been offered calls for an answer to an impossible question, and will have the effect of unsettling scores of negotiated state convictions, encouraging needless litigation, and creating a mass printing press in the federal courts for writs of habeas corpus.

Were this the only side effect of Judge Berzon's method, perhaps it would be tolerable. But there are at least two additional problems. First, it places federal courts in the role of instructing state prosecutors—members of the *state executive* branch—of how to conduct plea negotiations, or at least how much prison time a prosecutor is permitted to offer if the state decides to proceed with reprosecution after the writ of habeas corpus issues. To put it mildly, this

kind of interference with a state executive branch function raises substantial federalism concerns. *Cf. Printz v. United States*, 521 U.S. 898, 933 (1997).

Second, and related to the federalism problem, Judge Berzon's approach implicates the separation of powers with potential effects far beyond the current case.[24] Conducting this type of inquiry into whether a better plea bargain would have been available would require the kind of judicial review of prosecutorial decisions that courts have almost uniformly shunned. We have previously described the reasons for avoiding judicial review of the plea bargaining decision:

> Prosecutorial charging and plea bargaining decisions are particularly ill-suited for broad judicial oversight. In the first place, they involve exercises of judgment and discretion that are often difficult to articulate in a manner suitable for judicial evaluation. Such decisions are normally made as a result of careful professional judgment as to the strength of the evidence, the availability of resources, the visibility of the crime and the likely deterrent effect on the particular defendant and others similarly situated. Even were it able to collect, un-

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[24] Although the current case does not involve a direct extension of the judiciary's constitutional powers vis-a-vis coequal branches of the federal government because this case is before us on review of a state court's judgment, Judge Berzon's novel prejudice analysis, if adopted, also would apply to review of federal convictions, either under 28 U.S.C. § 2255 or on direct review.

derstand and balance all of these factors, a court would find it nearly impossible to lay down guidelines to be followed by prosecutors in future cases. We would be left with prosecutors not knowing when to prosecute and judges not having time to judge.

Assuming these problems of guidance and understanding could be overcome—and it is unlikely that they could be—there is an added constitutional consideration based on the peculiar relationship between the Office of the United States Attorney and the federal district courts: The United States is necessarily a party to every criminal case presented to a district court. It would raise serious separation of powers questions—as well as a host of virtually insurmountable practical problems—for the district court to inquire into and supervise the inner workings of the United States Attorney's Office.

The very breadth of the inquiry . . . would require that the government divulge minute details about the process by which scores, perhaps hundreds, of charging decisions are made. The court would also have to consider the validity of various rationales advanced for particular charging decisions, which would enmesh it deeply into the policies, practices and procedures of the United States Attorney's Office. Finally, the court would have to second-guess the prosecutor's judgment in a variety of

> cases to determine whether the reasons advanced therefore are a subterfuge.

United States v. Redondo-Lemos, 955 F.2d 1296, 1299-1300 (9th Cir. 1992) (footnotes and citations omitted), *overruled on other grounds*, *United States v. Armstrong*, 48 F.3d 1508, 1515 n.5 (9th Cir. 1995) (en banc); *see also Wayte*, 470 U.S. at 607-08 (recognizing that the "broad discretion" afforded the executive to evaluate such factors is "not readily susceptible to the kind of analysis the courts are competent to undertake"); *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 976 (9th Cir. 2000) (en banc) ("Courts generally have no place interfering with a prosecutor's discretion whom to prosecute, what charges to file, and whether to engage in plea negotiations.").

To be sure, prosecutorial discretion, including the discretion to negotiate plea bargains, does not give the executive branch license to violate a criminal defendant's due process rights, and courts widely agree that a prosecutor cannot hide discriminatory motives under the guise of prosecutorial discretion. *See United States v. Arenas-Ortiz*, 339 F.3d 1066, 1068 (9th Cir. 2003) ("One important restriction on prosecutorial discretion, however, is that 'the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification.' " (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)) (internal quotations removed)); *Redondo-Lemos*, 955 F.2d at 1299 ("Given the significance of the prosecutor's charging and plea bargaining decisions, it would offend common notions of justice to have them made on the basis of a dart

throw, a coin toss or some other arbitrary or capricious process."). But it is one thing to say that the executive branches of either the federal or state governments cannot prosecute selectively, for there are methods through which the judiciary can evaluate such claims. It is an entirely different, and far more bothersome, thing to instruct district courts to ask whether "the plea bargain outcome would have been improved upon the filing of the meritorious suppression motion." Concurring Op. at 9828-29. That analysis would require inquiry into the precise questions that this court has said courts should avoid and which the Constitution likely protects from judicial intrusion. *See Redondo-Lemos*, 955 F.2d at 1299-1300.

Judge Berzon responds by claiming that this is the type of inquiry that courts regularly undertake in ineffective assistance of counsel claims. *See* Concurring Op. at 9833-34. Rather than considering the prosecution's actions, Judge Berzon says that her approach would focus on "the defendant's and defense counsel's choices, defense counsel's judgment, and defense counsel's actions." *Id.* at 9833. But if the question posed is whether "the plea bargain outcome would have been improved upon the filing of the meritorious suppression motion," as she says it ought to be, *id.* at 9828, I fail to see how that could be done without looking at the prosecution's decisions "in the first instance." *Id.* at 9833. In an ineffective assistance of counsel claim following a trial, where the counterfactual question posed to the court concerns evaluating what a jury might have done, at least the evidence presented to the jury and the legal instructions it was

given are available for review. In contrast, in a plea bargain situation, there is no record at all about what other deals the prosecution might have offered.[25]

If, in contrast, "the question is whether, but for counsel's ineffective assistance, a defendant would [be] in a better position to negotiate with the prosecutor," as Judge Berzon articulates the test later on, *id.* at 9833, the new standard would entirely swallow *Hill*. Numerous cases decided under *Hill* can also be characterized as "deal[ing] with counsel's failure to *create* a proper legal landscape" by failing to take some strategic action. Concurring Op. at 9825. *See, e.g., Weaver*, 455 F.3d at 970-71 (9th Cir. 2006) (applying *Hill* to counsel's failure to investigate mental defect defense); *Langford*, 110 F.3d at 1386-87 (using *Hill* in guilty plea case alleging ineffective assistance of counsel based on failure to file various suppression motions). And filing a potentially meritorious suppression motion will *always* strengthen defense counsel's bargaining position (at least until a potentially adverse ruling is handed down). If the possibility that a more favorable plea bargain might have been offered if a potentially meritorious motion was not filed is sufficient to establish *Strickland* prejudice after a

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[25] I note that this problem is avoided under the *Hill* standard of prejudice: If the question is whether the defendant would have insisted on going to trial instead of taking the plea, that question *is* amenable to a reasoned answer by looking at the evidence presented by trial counsel and the defendant on habeas review about the defendant's discussions and choices. The *Hill* prejudice standard depends not at all on the prosecutor's considerations.

guilty plea, virtually every plea bargain in the country is now open to habeas relief.

Viewed within the proper standard of review under AEDPA, it was not an unreasonable application of Supreme Court law for the Oregon courts to evaluate Moore's claim under *Hill*. The case fits squarely within the rule of *Hill*: Moore asserts that his trial counsel failed to advise him that a motion to suppress might be successful. On the basis of that advice, Moore pled no contest to the charge of felony murder. Other courts considering such claims have uniformly looked to *Hill* for the correct standard.[26] Given that

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[26] *See, e.g., Gilbert v. Merchant*, 488 F.3d 780, 791 (7th Cir. 2007) ("[G]iven that he was convicted based on his own plea, Gilbert was obliged to complete the demonstration of prejudice by showing that had his confession been suppressed, it is reasonably likely that he would have gone to trial rather than plead guilty." (citing *Hill*, 474 U.S. at 59)); *United States v. Salazar*, 323 F.3d 852, 857 (10th Cir. 2003) (applying *Hill* to determine if defendant who pled guilty "should be allowed to pursue his suppression claim"); *Langford*, 110 F.3d at 1386-88; *Banks v. Hanks*, 41 F.3d 1187, 1189 (7th Cir. 1994); *Hale v. Lockhart*, 903 F.2d 545, 548-50 (8th Cir. 1990); *United States v. Carasis*, 863 F.2d 615, 616 (8th Cir. 1988) ("[B]ecause Davis' lawyer did not unreasonably forego filing a suppression motion on behalf of his client, we cannot say Davis has shown 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " (quoting *Hill*, 474 U.S. at 59)); *Hibbert v. Poole*, 415 F. Supp. 2d 225, 232-33 (W.D.N.Y. 2006) (applying *Hill* to prejudice determination when counsel advised defendant to plead guilty before court ruled on suppression

the federal courts have been applying *Hill*'s prejudice requirement to situations similar to the one presented by this case, it is difficult to see how a state court should have been able to divine this kind of extension of *Strickland* and *Kimmelman*. Judge Berzon's prejudice standard is not only not clearly established Supreme Court law; it is also contrary to all other federal authority. I therefore puzzle over Judge Berzon's objection that I do not cite to any case holding that her reading of the prejudice standard is precluded by *Hill*, *see* Concurring Op. at 9832, for all the cases she cites applying the *Kimmelman* standard occurred after a trial and did *not* involve the plea context. She also fails to respond to the numerous cases I have cited which apply *Hill* in the guilty plea context, other than to say that "[s]ome other cases . . . assume (as Judge Reinhardt does today) that *Hill* also applies in the motions context when a plea bargain is involved, as well as in the advice context." *Id.* From that, despite the absence of *any* case applying her proposed distinction to a guilty plea case, she draws the inexplicable conclusion that "these cases do not provide support for using *Hill* as the exclusive standard in such circumstances." *Id.*

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motion); *United States v. Hawkins*, 973 F. Supp. 825, 828 (S.D. Ill. 1997) ("Even if counsel's failure to file a motion . . . to suppress the evidence was unreasonable, defendant has not . . . alleged that he would have pled differently had the motions been filed, and had they later succeeded."); *Friedman v. Gamble*, 919 F. Supp. 1440, 1447 (D. Mont. 1995).

The Supreme Court would have had difficulty being more clear than it was in *Hill* about the proper prejudice standard for guilty pleas. It said, "We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, . . . to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." The *Hill* Court did not recognize Judge Berzon's distinction between pre-trial landscape setting ineffective assistance claims and advice to enter guilty plea claims, and she cannot point to a single federal court since *Hill* that has done so. Until the Supreme Court tells us otherwise, her proposed distinction is foreclosed by *Hill*. *See Carey v. Musladin*, 127 S. Ct. 649, 654 (2006) ("Given the lack of holdings from this Court . . ., it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.' " (quoting 28 U.S.C. § 2254(d)(1))).

The concurrence's argument is a disguised attempt implicitly to extend *Hill* to permit satisfaction of *Strickland*'s prejudice prong by demonstrating simply that a more favorable plea might have been obtained. Although Judge Berzon couches her argument as giving defendants the choice of proving prejudice under what is commonly perceived as the more difficult *Strickland* standard rather than proving prejudice under *Hill*, her approach actually achieves the opposite effect: Instead of being required to demonstrate that he would not have pled guilty but would have insisted on going to trial, Moore would only be required

to demonstrate that he *might* have obtained a more favorable plea agreement. This attempt misconceives the nature of plea bargaining, potentially violates principles of federalism and separation of powers, and ignores Supreme Court precedent on how to conduct the prejudice inquiry following plea agreements. Even if I were to agree that an ambiguity about the relationship between *Hill*, *Kimmelman*, and *Strickland* existed, it is not our job on AEDPA review to resolve it.

III. CONCLUSION

I cannot join anything the majority has written. For the reasons I have stated, I believe the majority to be wrong on the facts and the law, and I believe that it fails to accord the state court's decision the deference that AEDPA commands. At the end of the day, it is not clear what the majority has accomplished, for Moore or for anyone else. The majority grants Moore a writ of habeas corpus and orders the state either to permit Moore to withdraw his plea or to release him. Oregon will surely allow Moore to withdraw his plea and then prosecute him to the hilt. When it does, Oregon will be under no obligation to offer Moore any kind of a deal, and if it does decide to bargain, it has no obligation to offer Moore a plea bargain as attractive as what he got in this case. It may even decide to seek the death penalty. And even if Oregon were to offer a new plea deal, Moore's counsel must reject it until he has filed every conceivable pre-trial motion he can. After today's decision, no conscientious defense attorney should even consider accepting a plea deal—no matter how good the bar-

gain and no matter what other evidence the prosecutor has —if there are potentially "meritorious" motions that can be filed.

Oregon will try Moore and, given his confessions to family and friends, the available eyewitnesses, and other incontrovertible evidence, Moore will likely be found guilty of murder. For that, he is likely to receive a sentence well in excess of the bargain he negotiated. It is quite possible that Moore will be worse off for having prevailed here. Nor is it clear that anyone else after Moore will actually benefit from today's ruling. In fact, defendants whose counsel cannot negotiate plea agreements until after exhausting their pretrial motions are likely to be worse off for the majority's effort.

Today's decision is not a liberty-enhancing decision. It will actually hamper defense counsel's ability to avoid trial and negotiate plea agreements. And our decision is so unnecessary. Moore is plainly guilty of felony murder, or worse. He took a fair deal from the prosecutor on the advice of competent counsel. Justice was served. There is no reason for us to up-end the orderly administration of justice in Oregon in this way.

I respectfully dissent.

CALLAHAN, Circuit Judge, with whom KLEINFELD, TALLMAN, BYBEE, BEA, and N.R. SMITH, Circuit Judges, join, dissenting from denial of rehearing en banc:

I respectfully dissent from the order denying rehearing en banc. The panel's opinion fails to follow

the standard for determining ineffective assistance of counsel set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In particular, it fails to follow Supreme Court guidance on deference and improperly conflates the distinct concepts of deficient performance and prejudice, holding, in essence, and incorrectly, that because counsel's performance was deficient, it was also prejudicial. Furthermore, the majority fails to accord the state court decision the deference the Supreme Court has held it is due under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1). *See Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419-20 (2009). We should have reheard this case en banc to correct these departures from the Supreme Court's guidance and to ensure that the panel's opinion not give rise to a wave of new post-conviction petitions second-guessing acts by defense counsel engaged in prior to the defendants' pleas.

I

Several salient facts control this case and undermine the panel's findings of deficient performance and prejudice. First, we should focus on the reasons proffered by counsel for not filing a motion to suppress, not because the motion would not have been successful, but because the reasons bear on the real issue in this case: whether the attorney rendered ineffective assistance by counseling Moore to accept the plea bargain. The first two reasons were that (1) Moore did not think he was in custody, and (2) Moore had previously made a full confession to his brother, Raymond, and a woman named Debbie Ziegler. Affi-

davit of Kim Jordan, pp. 1-2. The third reason, which is also set forth in the attorney's affidavit, is that Moore affirmed to counsel that the confession he had given to the police was accurate.[1]

Second, any evaluation of counsel's decisions should take into account the quantum of evidence that counsel could reasonably have expected the prosecutor to have gathered, even if Moore's confession were suppressed. As persuasively set forth by Judge Bybee in his dissent, counsel recognized that the prosecutor had a very strong, if not air-tight case, regardless of Moore's confession.[2] When these essen-

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[1] Counsel's affidavit states:

> I do not recollect any material statement of fact in the police report with which Mr. Moore disagreed. Mr. Moore always claimed his actual shooting of the victim was an accident, but there was never the smallest doubt that it occurred during a kidnap which began with an assault.

Jordan Affidavit pp. 2-3. She further states:

> Mr. Moore believed that he was guilty of murder under the felony murder rule, although he felt that it was very unfortunate and lamentable that he was guilty since he always maintained that the actual firing of the shot was an accident rather than a premeditated act.

Jordan Affidavit p. 5.

[2] Judge Bybee notes:

> Under section 163.115 of the Oregon Revised Statutes, Rogers's killing was a felony murder if "it [was] committed by a person, . . . who commit[ted]

or attempt[ed] to commit [kidnapping or assault] and [the death occurred] in the course of and in furtherance of the crime the person [was] committing or attempting to commit." It is undisputed that Moore, Salyer, and Woolhiser went to Rogers's home, that Rogers was beaten, that he was bound with duct tape, and that he was thrown into the trunk of the car they had borrowed, driven to a remote location, and shot in the temple. It is indisputable that Moore, Salyer, and Woolhiser, by virtue of their involvement in the felonies of kidnapping and assault, were guilty of felony murder under Oregon law. It is equally indisputable that Moore had no affirmative defense. Thus, to convict Moore of felony murder, all that the state needed to do was prove that he took part in Rogers's kidnaping and that the murder furthered the kidnaping.

This would not have been hard. The state had both Roy Salyer and Lonnie Woolhiser in custody, and both could have been called to testify that Moore took part in the attack. The state court found that Moore and Woolhiser had also confessed to their older brother Raymond Moore as well as to Woolhiser's girlfriend, Debbie Ziegler. . . . . Before they left for Rogers's residence, Salyer, Moore, and Woolhiser had been drinking with others at Ziegler's residence. Salyer was "ranting and raving" about how Rogers had broken into his cabin and slashed his tires. This was what prompted the trio to head to Rogers's residence — to confront him about the robbery and to scare him out of ever committing another one. *Four* witnesses, including Ziegler, observed this entire interaction and then observed the trio drive off to confront Rogers — in a

tially undisputed facts are considered, counsel's decision not to file a motion to suppress, even though based on a mistaken understanding of the law, was neither unreasonable nor prejudicial.

Furthermore, in light of the other evidence that counsel reasonably expected the prosecutor to gather legally, it is important to recognize that the charge Moore pled to was felony murder. Counsel's concern had to be that Moore would be charged with aggravated murder, which would have potentially subjected him to the death penalty or life imprisonment.

> car that Salyer had borrowed from another one of the guests.
>
> When the trio arrived at Rogers's residence, other people were there. These people witnessed Moore, Woolhiser, and Salyer arrive, and at least one of those people spoke with Woolhiser about what they were doing there. Another was able to identify all three defendants from a photo lineup. These people would also have been able to testify that at this point the car's license plates had been covered over with duct tape. . . . . There was also highly inculpatory physical evidence in this case. The day before Moore confessed, Salyer led police to the location of the revolver they had used. The police were unable to find it in the dark, but Woolhiser led them back to the same area the next day, at which point they recovered the weapon. When police found the car that the trio had used, they found blood in the trunk, as well as hair.

Moore v. Czerniak, 534 F.3d 1128, 1181-82 (9th Cir. 2008) (Bybee, J., dissenting) (footnotes omitted).

See Moore v. Czerniak, 534 F.3d 1128,1176-77 (9th Cir. 2008) (Bybee, J., dissenting). Moore admitted that he had held the gun and had fired a single shot through Rogers's temple, causing his death.[3] Moore's claimed lack of intent is hardly compelling, and his counsel thought it "would have been malpractice" not to alert Moore to the possibility that he might be charged with aggravated murder. *See* Jordan Affidavit pp. 3-4. Thus, counsel had very good tactical reasons, even compelling reasons, for advising Moore to plead no-contest to the charge of felony-murder.[4]

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[3] Even the panel's description of Moore's version of the facts fails to place Moore in a good light:

> At some point during this walk, Woolhiser handed Moore a loaded gun. Moore explained that they had no intention of killing Rogers; they were simply going to frighten him by leaving him on top of the hill and forcing him to find his way back home. As the four climbed the hill, however, Rogers stumbled and fell back into Moore, causing the gun in his hands to discharge. As a result, Rogers died of an accidental gunshot wound to the head.

Moore, 534 F.3d at 1133.

[4] The panel cites the fact that Salyer went to trial and received the same twenty-five year sentence as Moore as suggesting that Moore did not benefit from his plea bargain. *See Moore*, 534 F.3d at 1143 n.15. This assertion, however, overlooks the fact that Moore, not Salyer, held the murder weapon and fired the single shot that killed Rogers. Thus, Salyer did not face the same risk as Moore did of being charged with aggravated murder.

The fact that Moore had substantial, if not compelling, reasons to accept the plea bargain of felony-murder makes it very difficult to reconcile the majority's opinion with the Supreme Court's recent opinion in *Mirzayance*. In that case, the Supreme Court overruled our holding that counsel had rendered ineffective assistance of counsel by withdrawing a not guilty by reason of insanity (NGI) plea after the jury convicted Mirzayance of first-degree murder because the defendant had nothing to lose from pursuing the NGI plea. *Mirzayance*, 129 S. Ct. at 1418. Here, however, counsel, by arranging for Moore to plead no-contest to felony-murder, spared Moore from facing the possibility of the death penalty or life in prison. While a twenty-five year prison term may appear to be a long sentence, the finite nature of the term presents significant advantages to Moore. Moore saves his life and is assured of release from prison when he completes his twenty-five year term or is released early on parole or for good behavior. Unlike the situation in *Mirzayance*, where the defendant would not have been worse off if counsel had pursued the NGI plea, here, a failure to accept the plea bargain could have subjected Moore to a trial for aggravated murder with the possibility of the death penalty or life imprisonment.

The panel's concern with the motion to suppress rather than the plea also fails to appreciate *McMann v. Richardson*, 397 U.S. 759 (1970) and *United States v. Ruiz*, 536 U.S. 622 (2002). In *McMann*, the Supreme Court reasoned:

> In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.

397 U.S. at 770-71 (footnote omitted). In *Ruiz*, the Court, in reversing the Ninth Circuit's holding that required impeachment evidence to first be disclosed before a plea agreement would be held voluntary, observed "that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." 536 U.S. at 630. Here, regardless of the propriety of his confession to the police, Moore was informed of all the circumstances of the underlying crime, and his counsel reasonably understood that the state had more than sufficient evidence to convict Moore even without his confession. Pursuant to *McMann* and *Ruiz* there are no grounds for disturbing Moore's plea of no contest.

The Supreme Court has repeatedly stated that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms," that "[j]udicial scrutiny of counsel's performance must be highly deferential," and that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Mirzayance*, 129 S. Ct. at 1420 (quoting *Strickland*, 466 U.S. at 688-89). Even accepting that counsel should have filed a motion to suppress, and that it would have been granted, the case against Moore would have remained overwhelming and accordingly, counsel's advice to plead no-contest to the charge of felony-murder was neither deficient nor prejudicial.

II

Furthermore, our own views of counsel's competence are only tangentially relevant. As the panel recognizes, "we may grant habeas relief only when the state court's decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States' or 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' 28 U.S.C. 2254(d)." *Moore*, 534 F.3d at 1136. In *Mirzayance*, the Supreme Court noted that under AEDPA, determinations of ineffective assistance of counsel are entitled to double deference. 129 S. Ct. at 1420. The question " 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was

unreasonable — a substantially higher threshold.' " *Id.* (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). Moreover, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Mirzayance*, 129 S. Ct. at 1240.

Here, the state court held a hearing on Moore's postconviction petition and denied relief. *Moore*, 534 F.3d at 1134. The state court thought that counsel's failure to file a motion to suppress was reasonable, and it also found that the motion would have been "fruitless" because Moore had previously confessed to Raymond and Debbie Ziegler. *Id.* When Moore filed his federal habeas petition, the district court also found that there was no ineffective assistance of counsel because of Moore's prior confession and the potential adverse testimony of Salyer. *Id.* at 1135.

The panel argues that Raymond's and Ziegler's testimony would not have been as powerful as Moore's confession. *See id.* at 1148. Whether or not true, the panel does not answer the critical question: whether it was reasonable for the state court to determine that in light of Raymond's and Ziegler's potential testimony, as well as all the other evidence connecting Moore to the kidnaping and shooting, the motion to suppress would have been "fruitless." In light of the other evidence available to the prosecutor, the fact that Moore had admitted that he committed the underlying crime to his counsel (and others), and the possibility that Moore could be charged with aggravated murder in addition to felony-murder, coun-

sel's decision to forego the motion to suppress and to recommend a no-contest plea to a charge of felony-murder, was certainly a reasonable decision.

It follows under the Supreme Court's reading of AEDPA in *Mirzayance*, that even when the panel concluded that the state court's determination that the motion to suppress would be fruitless was incorrect, it should nonetheless have deferred to that decision because it is not objectively unreasonable. *See Mirzayance*, 129 S. Ct. at 1420. Here, for the reasons well articulated by Judge Bybee in his dissent to the panel's opinion, the state court's and the district court's determinations that Moore did not receive ineffective assistance of counsel if not correct are nonetheless clearly not unreasonable.[5]

III

The panel's erudition cannot hide the problematic nature of its decision when the case is reviewed on its stark facts. In 1995, Moore admitted to participating in the kidnaping of Rogers and subsequently told at least two persons that during the kidnaping he had fired the single shot that had killed Rogers. Counsel managed to secure a no-contest plea to a charge of felony-murder that resulted in a twenty-five year prison term. Now, some fourteen years later, the majority would vacate the conviction and sentence be-

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[5] In *Mirzayance*, the Supreme Court commented: "[b]ut, courts of appeals may not set aside a district court's factual findings unless those findings are clearly erroneous. Fed. Rule Civ. Proc. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573-574 . . . (1985)." 129 S. Ct. at 1421.

cause counsel failed to file a motion to suppress Moore's confession to the police. This confession, however, was made after Moore had confessed to two other persons. Moreover, Moore and his counsel did not think that his confession had been coerced, and Moore has never questioned the veracity of his confession.

The panel argues that a motion to suppress the confession should have been made and would have been successful. But under the Supreme Court's opinions in *McMann*, 397 U.S. at 770-71, *Ruiz*, 536 U.S. at 630, and *Mirzayance*, 129 S.Ct. at 1420, such a determination does not entitle Moore to relief. Rather, he must show that (a) counsel's overall performance, particularly the advice to plead no-contest to felony-murder, was deficient, (b) counsel's performance and advice was prejudicial, and (c) the state court's contrary determination was objectively unreasonable. The underlying facts in this case simply do not support such determinations. We should have taken this case en banc to correct the panel's conflation of the performance and prejudice prongs of the *Strickland* standard for ineffective assistance of counsel and its failure to follow the Supreme Court's guidance on deferring to counsel and to the reasonable determinations of state courts and district courts.

Finally, and equally important, the practical implications of our failure to take this case en banc are significant. The panel opinion creates out of whole cloth a new area of potential habeas relief where defense counsel is faced with a "Morton's Fork" — a choice between two equally unpleasant alternatives.

Filing a motion to suppress might have weakened the prosecutor's hand, possibly, but not necessarily or even probably, resulting in the prosecutor offering a better deal. However accepting the plea bargain when offered protected the defendant from exposure to a much harsher sentence. As if labeling as ineffective defense counsel's resolution of such an impossible dilemma weren't bad enough, the panel opinion also sanctions federal habeas relief on this basis even where the strategy foregone has been declared "fruitless" by a state court. We should have taken this case en banc to ensure that the panel's opinion does not give rise to a wave of new postconviction petitions second guessing defense counsel's every forbearance.

BEA, Circuit Judge, with whom, KLEINFELD, TALLMAN, CALLAHAN, BYBEE, and N.R. SMITH, Circuit Judges, join, dissenting from the order denying the petition for rehearing en banc:

One of two things must be true. Either (1) the majority's conclusion that Randy Moore suffered prejudice depends on some egregious and highly creative appellate fact-finding by which the majority concludes that Moore's confessions to his brother and a friend lacked inculpatory detail; or (2) the majority has invented a new, virtually *per se* rule that counsel's failure to file a meritorious motion to suppress a defendant's confession to the police *always* entitles a habeas petitioner to relief under *Strickland*, no matter how many other people the defendant confesses to. In either case, rehearing was warranted to correct the panel's error. I join fully in Judge Callahan's dissent from the order denying rehearing en banc, but

write separately to emphasize my concern with the majority's treatment of the state court's factual determinations.

The facts, briefly, are these: Randy Moore, along with two accomplices, Lonnie Woolhiser and Roy Salyer, assaulted Kenneth Rodgers, tied him up, threw him in the trunk of their car, drove him to an isolated spot, blindfolded him, marched him into the woods, and then 'accidentally' shot him in the temple at point-blank range. Moore pleaded guilty to felony murder and was sentenced to 300 months' imprisonment. Despite the fact that Moore confessed to being the trigger man, not once, not twice, but three times, and despite the fact that Moore told his counsel that these confessions were true, and despite the fact that the state court found that a motion to suppress would have been fruitless, the majority holds that Moore's counsel's failure to file a motion to suppress *one of the three* separate confessions constituted ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

The majority concludes the state court's determination Moore did not receive ineffective assistance of counsel was unreasonable, at least in part, because the record is devoid of evidence about which details of the crime Moore divulged in his confessions to Ziegler and Raymond Moore. *Moore v. Czerniak*, 534 F.3d 1128, 1131 (9th Cir. 2008); *id.* at 1147 n.21 ("Moore's taped confession would have been the only full account of the events . . . ."); *id.* at 1148 ("[I]t is far from clear what those witnesses would have said [if called to testify]. . . ."); *id.* at 1148-49 n.24. This, charitably

put, is imaginative appellate fact-finding made possible only by ignoring some inconvenient facts in the record.

To the contrary, Moore's counsel, Kim Jordan, averred Moore had given "full"[1] confessions to both Ziegler and Raymond Moore. Jordan used this word—"full"—three times in his affidavit. Jordan's statement is some of the most probative evidence we could have of the extent and content of these confessions—counsel's knowledge is based, at least in part, on communications with the defendant, and it is, after all, Jordan's performance we are now evaluating.

The state court credited Jordan's affidavit and found "[b]oth Raymond Moore and the friend [Ziegler] could have been called as witnesses to repeat petitioner's confession. A motion to suppress would have been fruitless." In doing so, the state court even cited to the portion of Jordan's affidavit describing the confessions as "full."

The majority first concludes this finding is inadequate because the state court did not expressly find that the two prior confessions were "full." This cramped reading is both incorrect and contrary to longstanding, controlling precedent regarding implied findings. "[N]ot every finding of fact need be stated on the record in infinite detail and clarity. . . . When a state trial court holds a hearing on a motion to suppress evidence and rules on the motion, a federal dis-

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[1] Full: "2. Complete in every detail <a *full* account of the incident>." Webster's II New Riverside University Dictionary 511 (1984).

trict court may assume that the state court found the facts necessary to support the state court's decision . . . ." *Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir. 1986).

In any case, says the majority, such a finding of fact, had it been made, would have been unreasonable under *Taylor v. Maddox*, 366 F.3d 992, 1000-01 (9th Cir. 2004), because the state court ignored "highly probative" and "relevant" evidence that contradicts Jordan's statement that Ziegler heard a full confession. *Moore*, 534 F.3d at 1149 n.24. This "highly probative" and "relevant" evidence consists, in its entirety, of Ziegler's statement to police that she had not heard the details of Moore's confession until the day of the police interrogation. That Ziegler heard Moore's confession for the first time that day hardly proves she didn't hear the confession until she was in the police interrogation room itself; that interrogation did not begin until the late afternoon. Moore had ample opportunity to confess to her before he arrived at the police station. Even Moore's briefs describe Ziegler's statements about when she heard the confession as "ambiguous" and "equivocal."

As important as the evidence that is in the record as to the fullness of Moore's confession to Ziegler is the evidence that isn't. Moore has not provided a shred of evidence to support his claims that his confessions to Ziegler and to his brother Raymond lacked inculpatory detail, that Moore did not confess to Ziegler prior to the police interrogation, or that Ziegler and Raymond would have been reluctant witnesses at trial. For example, Moore could have, but

did not, offer proof by way of affidavits or declarations from Ziegler or Raymond to corroborate his present contentions. As Moore's habeas counsel explained, "Nobody knows what Raymond Moore, Mrs. Ziegler, or [Roy] Salyer would have said" at trial. Our ignorance on this score is entirely caused by Moore and he must bear the consequences, for on all aspects of the *Strickland* inquiry, Moore bears the burden of proof. *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). The state court reasonably could have inferred the falsity of Moore's present claims that his confessions to Ziegler and brother Raymond lacked critical details, and hence probative force, from his failure to offer evidence to buttress them.

The majority was not free to ignore the state court's findings as to the completeness of Moore's confessions to Raymond and Ziegler unless it could point to record evidence showing such findings of completeness to be objectively unreasonable. 28 U.S.C. § 2254(d)(2). Here, the panel has simply substituted its own view of the facts for that of the state court. Doing so in this case is especially troubling. As is often the case in habeas proceedings, the record the petitioner has provided is thin and leaves many gaps to be filled by the finder of fact. But we cannot do so ourselves; that is the role of the state courts and, under appropriate circumstances, the federal district court. It is never our role.

If the panel majority's expressed doubts about the fullness of Moore's confessions are unnecessary to the decision, then the need for rehearing is all the more obvious. If such is the case, the majority has created a

new, virtually *per se* rule that the failure to file a meritorious motion to suppress a defendant's confession to the police is always prejudicial. If the existence of *two* separate, independent, and mutually corroborating confessions, given to persons to whom the defendant was personally close, is insufficient to establish harmless error, little will be. After all, a "confession is like no other evidence." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

The majority correctly observes that there were also multiple confessions in *Fulminante*. But the differences between this case and *Fulminante* are stark. The second confession in *Fulminante* was given: (1) to a single individual; (2) to a virtual stranger, whose only connection to Fulminante was the fact that she was the wife of the investigating officer; (3) to a person whose credibility was made dubious by her failure to report Fulminante to the authorities and by the fact that, after Fulminante confessed, she voluntarily associated with him despite her stated disgust at his actions; and (4) to a person who reported the confession to authorities under highly suspicious circumstances. *Id.* at 298-99. Here, Moore's twin confessions to close associates—one of them his own brother — whose testimony the jury would have had little reason to doubt, bear little resemblance to the single confession in *Fulminante*.

Even if, on direct appeal, we might conclude that Moore's counsel's failure to file a motion to suppress the confession to the police entitled Moore to relief under *Strickland*, it strains credulity to claim that the

state court's decision was contrary to, or an unreasonable application of, the *Fulminante* decision.

For these reasons, and the reasons persuasively set forth by Judges Bybee and Callahan, I respectfully dissent from the denial of rehearing en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RANDY JOSEPH MOORE,

Petitioner,

vs.

STANLEY CZERNIAK,

Respondent.

Civil No. 01-01795-ST

FINDINGS AND RECOMMENDATION

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STEWART, Magistrate Judge.

Petitioner brings this 28 U.S.C. § 2254 habeas corpus action challenging his conviction and sentence resulting from his no contest plea to Murder With a Firearm. For the reasons set forth below, the Petition for Writ of Habeas Corpus (docket #1) should be denied.

BACKGROUND

On December 7, 1995, three men assaulted Kenneth Rogers in his residence, drove him to a remote location, and killed him with a single gunshot to the head. The men responsible for these crimes were petitioner, Lonnie Woolhiser and Roy Salyer.

Salyer was the first of the three to be interviewed the police, and on December 19, 1995, he showed authorities where the shooting occurred. Respondent's Exhibit 115, Att. 3, p. 1. He was subsequently booked into jail that evening. Id.

Later the same night, police interviewed petitioner and Woolhiser for the first time. During that interview, petitioner admitted only that he, Woolhiser and Salyer visited Rogers at his residence to confront the victim about a theft at Salyer's cabin. Id at 2. Petitioner then invoked his right to remain silent. Respondent's Exhibit 122, p. 26. Authorities returned to him 10 minutes later "and they said, well, we contacted your brother Ray and we'll release you only if you go see your brother Ray and come back tomorrow at 1:00." Id. Petitioner agreed.

The following day, petitioner, Woolhiser, and Salyer returned to the police station where they were interviewed by three detectives. Their friend Debbie Ziegler, and petitioner's brother, Ray Moore ("Moore"), accompanied them.

It is important to note that Moore was not new to the criminal justice system. In 1984 or 1985, he fatally shot a friend in a gun fight, and the charges had been dismissed in exchange for his cooperation and participation as an undercover police informant.[1] Respondent's Exhibit 122, pp. 8-9. Two of the detectives involved in that case, Dutch Whitehead and Carroll Huffman, were present for petitioner's interview and, on the previous night, advised both Woolhiser and petitioner to seek out Moore's advice. Id at 9, 23. Since the same detectives who promised Moore leniency in his case were the detectives working petitioner's case, Moore apparently accompanied petitioner to the interview seeking to work out a similar arrangement for him.

At the beginning of the December 20, 1995 interview, Detective Sergeant Ron Goodpasture told the men, "you haven't been charged with anything yet. When and if we arrest you, then you'll be charged." Respondent's Exhibit 115, Att. 1, p. 1. Moore indicated that the suspects had shown an "interest in an attorney, 'cause they're . . . kinda scared." Id at 2. Pe-

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[1] Moore acted as an informant "on numerous sting cases . . . which resulted in the arrest of 39 people and the disbanding of numerous laboratories for methamphetamines . . . ." Respondent's Exhibit 123, p. 8.

titioner told the detectives, "I have to be able to talk to somebody that's on my side . . . I don't trust my judgment right now." Id.

Detective Huffman simply responded that petitioner seemed "pretty upset, that's understandable." Id. Shortly thereafter, petitioner said he wanted to "talk to a lawyer" as "quick as possible." Id at 3. Detective Whitehead responded that only under two circumstances could an attorney be appointed: (1) if the suspects were formally charged and could not afford an attorney, or (2) if they retained their own private attorney, which the suspects could not afford. Id at 3-4. The interview therefore continued without counsel.

The authorities repeatedly offered to "go to bat" for the suspects so long as they were truthful. Id at 4-6. Petitioner and Woolhiser exchanged words which were not transcribed, but which appear to have addressed the issue of legal representation. Id at 6. The following exchange then ensued:

Whitehead:	Hold on a second. You've already, you've already said that you wanted an attorney. Here and on this tape recorder your changing your mind and you're willing to talk with us.
Petitioner:	Yes.
Whitehead:	Okay, so that you know you're going to get a fair shake from us alright, I want to verify that with our DA that he is not going and turn around and jam you. I want

him to tell me right now on the phone that you can change your mind and he will accept it. So there's no jammin' down the road, okay?

Petitioner: Okay.

Whitehead: So give me a minute and let me go call him.

Huffman: Hey, we respect you guys for coming in. And you know, we believed you last night. Take a man to admit he made a mistake.

??: _____??

Huffman: Hard thing to do. But, once you make that step, then life starts over for you.

??: _____??

Huffman: It does, guarantee you. Your brother there can tell you about that.

Id at 6-7 (spaces and ??'s in original).

Detective Whitehead returned to the interview room after telephoning the district attorney and the following then took place:

Whitehead: First off, um Randy you and Lonnie have come to the Sheriff's Office here voluntarily. Is that true or not true?

Petitioner: Yes sir, it is true.

Whitehead: Ok, While you're here in the Sheriff's Office are either one of you in custody at this point?

Petitioner: No, we're not.

Woohiser: No.

Whitehead: K. Have either one of you been charged with any type of a crime?

Petitioner: No.

Woolhiser: Not at the present (laughter).

Whitehead: Has anyone promised you anything to give us a statement here today?

Petitioner: Not other un helpin the best you could.

Whitehead: And . . . what I told you there that . . . with a statement just like I told everybody else involved in this investigation with a statement that comes truthfully I would go make the recommendations and thats for my (unreadable).

Petitioner: Yep.

Whitehead: Ok. Have we in any way threatened you to come here in the Sheriff's Office today?

Woolhiser: No.

Petitioner: No.

Whitehead: OK. While we were talking earlier a comment was made by you Randy that you were thinking maybe you wanted somebody on yer side K which in essence . . . you said I want somebody on my side and maybe I should talk to an attorney, true?

Petitioner: Yes.

Whitehead: K. At . . . about five minutes later you changed your mind and you said that you wanted to go ahead and clear this up and you were about ready to talk to us and I stopped you.

Petitioner: That's right.

Whitehead: OK. What I want to do now is to let you know cuz I did make a statement I said something about well there's only a couple of ways I'm aware of that you can get an attorney, one is to hire one for yourself or be charged formally with a crime and they you get one to appoint you, or to represent you, right?

Petitioner: Yes.

Whitehead: Ok. Humph. I was wrong. If uh when after talking to the DA cuz

I told ya I wanted to call him first, didn't want to jam you guys at all right?

Petitioner: Um hum.

Whitehead: I called him and he said if you want an attorney court appointed attorney you can have one at this time, K? But if you want to go ahead and talk with us you can. The main thing is we want everybody on this recording to know that you guys are not in custody, K? And this is not an in um in custody interrogation type of thing. K?

Petitioner: K.

Whitehead: And um I want everybody to know that you came in here under your own free will, true?

Petitioner: Yes, true.

Whitehead: You were about to volunteer a statement to us when I stopped you, is that true?

Woolhiser: True.

Petitioner: Yes.

Whitehead: K. Cuz I want everybody to know from this moment on if we go on with this statement that in no way you guys were coerced or

anything else and you understand that we do not and will not wilfully violate your rights.

Petitioner: Yes.

Whitehead: K. You guys got any questions of that at all?

Petitioner: No.

Woolhiser: Not really.

Whitehead: OK. Now uh your brother made a comment to you a while back during our first conversation that if in your gut you think you need an attorney, that's what you should do. Shortly after he made that you guys started to give us a statement, true?

Petitioner: True.

Whitehead: So now I guess where we're at is uh where do we go from here.

Petitioner: Hum.

Petitioner: I guess I need to make a statement.

. . . .

Whitehead: K. Now you understand if you make this statement, K, you can stop talking any time you wish, K? And you understand that at any time that you decide you

have the right to turn around and leave any time you want to, you're free to go, you're not in custody and you have the right to stop and say at this point I think I want to talk to an attorney and we'll see what we can do about getting you one. Ya all understand that?

Petitioner: Yep.

Id, Att. 2, pp. 1-4.

Petitioner and Woolhiser then related their version of events. Woolhiser entered Rogers' residence first and assaulted him before tying his hands with duct tape. Id at 14-19. The men then placed Rogers in the trunk of their car and drove him to a remote area. Id at 20, 23. After arriving at their destination, petitioner "took the gun from Lonnie cuz [he] didn't want nuttin you know like that to happen and it happened." Id at 9. The men attempted to walk Rogers up a hill, but he stumbled, fell back into petitioner, and the gun went off. Id at 24, 29. Rogers died of a gunshot wound to his temple. Respondent's Exhibit 105, p. 16.

Petitioner was ultimately charged with Murder with a Firearm. Respondent's Exhibit 102. He entered a plea of no contest to Murder, and, pursuant to Measure 11, the court sentenced him to 300 months of imprisonment and lifetime postprison supervision. Respondent's Exhibit 106, p. 49.

Petitioner directly appealed his sentence. The Oregon Court of Appeals affirmed the trial court without opinion and the Oregon Supreme Court denied review. State v. Moore, 151 Or. App. 464, 951 P.2d 204 (1997), rev. denied 326 Or. 507, 953 P.2d 395 (1998).

Petitioner next filed for post-conviction review ("PCR"), but the PCR trial court denied relief on his claims. The Oregon Court of Appeals affirmed the lower court without opinion, and the Oregon Supreme Court denied review. Moore v. Palmateer, 174 Or. App. 321, 26 P.3d 191, rev. denied 332 Or. 430, 30 P.3d 1184 (2001).

Petitioner filed this habeas corpus action raising ten claims of ineffective assistance of trial counsel, one claim of ineffective assistance of appellate counsel and three due process claims. Because these grounds for relief are accurately set out in respondent's brief, they are not repeated here. Respondent asks the court to deny relief on these claims because the state court decisions are neither contrary to, nor unreasonable applications of, United States Supreme Court precedent.

DISCUSSION

I. Standard of Review

An application for a writ of habeas corpus shall not be granted unless adjudication of the claim in state court resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "based on

an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's findings of fact are presumed correct and petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court decision is "contrary to . . . clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause, a federal habeas court may grant relief "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." Id at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. Id at 410. The state court's application of clearly established law must be objectively unreasonable. Id at 409.

When a state court reaches a decision on the merits but provides no reasoning to support its conclusion, the federal habeas court must conduct an independent review of the record to determine whether the state court clearly erred in its application of Supreme Court law. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000). In such an instance, the court independently reviews the record, but still defers to the

state court's ultimate decision. Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).

II. Analysis

In response to the Petition for Writ of Habeas Corpus, the State filed a memorandum which addresses all of petitioner's grounds for relief. In his reply to the State's responsive brief, petitioner focuses only on the following issue: whether trial counsel was constitutionally ineffective for failing to adequately investigate and move to suppress petitioner's inculpatory statements to police.[2]

Petitioner fails to provide any argument to rebut the State's assertions with respect to the remainder of his claims. The court has nonetheless reviewed the remaining claims and determines that they are without merit. Accordingly, relief should be denied on these claims. See 28 U.S.C. § 2248 ("The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true").

2. Ineffective Assistance of Trial Counsel

Petitioner asserts that his Sixth Amendment right to counsel was violated when his trial attorney failed to investigate and suppress petitioner's inculpatory statements to authorities on the grounds that the detectives failed to give petitioner his Miranda warn-

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[2] This claim comprises Ground One and a portion of Ground Two of petitioner's original habeas corpus claims.

ings, refused to honor his invocation of his rights to counsel and to remain silent, and coerced his cooperation through false promises.

The Supreme Court has established a two-part test to determine whether a petitioner has received ineffective assistance of counsel. First, the petitioner must show that his lawyer's performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 686-687 (1984). Due to the difficulties in evaluating counsel's performance, courts must indulge a strong presumption that the conduct falls within the "wide range of reasonable professional assistance." Id at 689.

Second, the petitioner must show that his lawyer's performance prejudiced the defense. In order to prove prejudice, a petitioner who has pled no contest to an offense must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have entered such a plea and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The PCR trial court made extensive findings in petitioner's case. With respect to petitioner's claim that his request for counsel was unconstitutionally disregarded, the PCR trial court found as follows:

> 2. Defendant established that petitioner was not in custody at the time he spoke to the sheriff's office. As a result, whether the sheriff's detectives continued to question petitioner after his alleged request for an attorney is irrelevant. Even if petitioner did invoke his right to counsel when he said he

> would like to talk to a lawyer, the detectives did not violate his state and federal constitutional rights when they continued speaking with petitioner because he was not in custody.

Respondent's Exhibit 124, p. 3 (citation omitted).

The PCR trial court also found that a reasonable person in petitioner's situation would believe he was not in custody, and that it was clear that petitioner knew this as well. Id at 4.

With respect to counsel's decision not to move for suppression of petitioner's confession, the PCR trial court stated:

> Counsel offered two reasons for not filing the motion. Counsel asserts it was clear that petitioner was not in custody when he gave his confession, noting that petitioner never believed that he was in custody and admitted to me that he realized he was not in custody when he and his brothers and another friend voluntarily came to the police department to give the recorded statement. Because petitioner was not in custody when he gave his statement, there was no basis for filing a motion to suppress.
>
> Counsel further explains that he did not move to suppress because petitioner had previously confessed his participation in the crime to his brother (Raymond Moore) and another friend. Both Raymond Moore and the friend could have been called as witnesses to repeat peti-

> tioner's confession. A motion to suppress would have been fruitless.
>
> The Court finds that there is very little chance that petitioner's confession would have been suppressed. Given petitioner's confession, counsel obtained the best plea offer he could for petitioner and petitioner accepted the offer after careful consideration.

Id at 6 (internal quotations and citations omitted).

Based on these factual findings, the PCR trial court concluded that "petitioner was not denied the right to assistance of counsel, as guaranteed by either the United States Constitution and as articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984) . . . ." Id at 7.

In Miranda v. Arizona, 384 U.S. 436, 478-79 (1966), the Supreme Court held that before authorities can subject a person to a custodial interrogation, the Fifth and Fourteenth Amendments require them to notify the suspect of his right to remain silent and his right to the presence of an attorney. Petitioner claims that he was not informed of these rights prior to the December 20, 1995 interview, and when he did request counsel, an attorney was not provided and questioning did not cease. He therefore asserts that trial counsel was constitutionally ineffective for failing to move to suppress petitioner's inculpatory statements.

As recognized in Miranda, and reiterated by the Supreme Court in Minnesota v. Murphy, 465 U.S. 420, 430 (1984), the Miranda safeguards do not apply

outside the context of custodial interrogations. Petitioner's trial attorney attests that petitioner "never believed that he was in custody and admitted to me that he realized he was not in custody when he and his brothers and another friend voluntarily came to the police department to give the recorded statement."[3] Respondent's Exhibit 120, p. 2.

In light of the affidavit and the underlying record, it determined that petitioner was not "in custody" when he made his inculpatory statements. Petitioner has not overcome this factual finding with clear and convincing evidence, and the record in this case supports the PCR trial court's finding. Because the Miranda safeguards did not apply to petitioner's non-custodial interrogation, any motion to suppress his statements on this basis would have been futile.

Petitioner also contends that counsel should have filed a motion to suppress the statements because they were coerced by false promises, and therefore were involuntary. "A statement is involuntary if it is extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence." United States v. Bautista-Avila, 6 F.3d 1360, 1364 (9th Cir. 1993) (quotations and citations omitted). The test to determine voluntariness is "whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that

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[3] The PCR trial court flatly stated that it "believe[d] trial counsel's affidavit." Respondent's Exhibit 123, p. 1.

the suspect's will was overborne." Derrick v. Peterson, 924 F.2d 813, 817 (9th Cir. 1990), cert. denied 502 U.S. 853 (citations omitted).

"An interrogating agent's promise to inform the government prosecutor about a suspect's cooperation does not render a subsequent statement involuntary, even when it is accompanied by a promise to recommend leniency, or by speculation that cooperation will have a positive effect." United States v. Leon Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988). A promise by law enforcement personnel "must be sufficiently compelling to overbear the suspect's will in light of all attendant circumstances." Id.

When petitioner first met with detectives, they encouraged him to speak with Moore and return to the police station the following day. When Moore accompanied the three suspects to the interview, it appeared that he was trying to negotiate a lesser charge for petitioner.

As petitioner testified in his PCR trial, "[the detectives] convinced me to waiving my right to an attorney and giving a confession of what happened and they said they'd go to bat for me like they did for my brother Ray." Respondent's Exhibit 122, p. 27. Petitioner's understanding of "got to bat" was that the detectives "would see to it was charged as an accident, not murder." Id. He "knew the death had happened and it wasn't in defense of somebody so [he] was going to get something out of it but not murder." Id.

There was at least an implication in the detectives' conduct that petitioner would be afforded leni-

ency. They asked him to speak with his brother, who previously had similar charges dropped by the same detectives in exchange for his cooperation. They repeatedly told petitioner they would "go to bat" for him. In fact, Detective Huffman explicitly told him that confessing was a "[h]ard thing to do. But, once you make that step then life starts over for you. . . . It does, guarantee you. Your brother there can tell you that." Respondent's Exhibit 115, pp. 6-7.

This could be construed as a guarantee that petitioner would enjoy leniency similar to that which the detectives afforded Moore. A reasonable person in petitioner's position would have concluded that an offer of leniency had been extended in exchange for a confession. It is clear petitioner subjectively believed that this offer was made, and confessed to Rogers' murder based on this false promise. The false promise of leniency, made entirely believable by the continual references and comparison's to Moore's prior situation, rendered petitioner's confession involuntary.

Even though petitioner's confession was not voluntarily entered, counsel's failure to seek suppression did not necessarily fall below an objective standard of reasonableness. Counsel attests, and the PCR trial court factually found, that petitioner previously confessed the shooting to Moore and another friend, Debbie Ziegler. Respondent's Exhibit 120, p. 2; Respondent's Exhibit 123, p. 1; Respondent's Exhibit 124, p. 6. Because petitioner fails to controvert this factual finding with clear and convincing evidence, it

is accepted as true.[4] Because Moore and Ziegler could have been called to testify to the same statements petitioner made to authorities, petitioner would have been in no better position if his inculpatory statements to police had been suppressed.

In addition, there is evidence in the record that Salyer informed police of the details of Rogers' murder before the detectives contacted petitioner on December 19, 1995. Salyer apparently provided detectives with the details of the crime when he took them to the location where the shooting occurred. Respondent's Exhibit 115, Att. 3. When Detective Whitehead asked petitioner and Woolhiser if they had any knowledge of whether Salyer discussed the crime with anyone, Woolhiser responded, "[t]o you guys evidently (laughter)." Id, Att. 2, p. 73. Thus, petitioner would also have been faced with damaging testimony from Salyer which would have encompassed the details in petitioner's confession to authorities.

---

[4] There is no question petitioner confessed to Moore. He testified during the PCR trial that "I talked to [the three suspects] at Lonnie's house at which time they basically ran down to me the scenario that had occurred and asked me what they should do." Respondent's Exhibit 122, p. 11.

It also appears that Debbie Ziegler was present when petitioner and Woolhiser confessed their participation in the crime to Moore. The confession to both Moore and Ziegler appears to have taken place on December 20, 1995, prior to petitioner's interview with the detectives later that afternoon. Respondent's Exhibit 115, Att. 2, p. 50.

For these reasons, even if a suppression motion would have been successful, the suppressed confession would have been redundant. The same information could have been introduced at trial through other sources, and petitioner would have been in no better to proceed to trial. Accordingly, counsel's performance did not fall below an objective standard of reasonableness when he declined to move to suppress petitioner's confession.

Petitioner is also unable to demonstrate that he suffered prejudice since his decision to enter pleas of no contest would not have changed given his prior confessions to Moore and Ziegler, as well as Salyer's demonstrated willingness to cooperate with the police. As petitioner is unable to show either deficient performance or prejudice, the PCR trial court's conclusion is neither contrary to, nor an unreasonable application of, Strickland v. Washington.

RECOMMENDATION

For the reasons identified above, the Petition for Writ of Habeas Corpus (docket #1) should be DENIED, and this proceeding should be DISMISSED.

SCHEDULING ORDER

Objections to these Findings and Recommendation(s), if any, are due December 22, 2003. If no objections are filed, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement on that date.

If objections are filed, the response is due no later than January 12, 2004. When the response is due or filed, whichever date is earlier, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement.

DATED this 3rd day of December, 2003.

/s/ Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RANDY JOSEPH MOORE,

Petitioner,

vs.

STANLEY CZERNIAK,

Respondent.

CV-01-01795-ST

ORDER

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BROWN, Judge.

Magistrate Judge Janice M. Stewart issued Findings and Recommendation (#39) on December 3, 2003, in which she recommended the Court deny the Petition for Writ of Habeas Corpus (#1). Both Petitioner and Respondent filed timely objections to the Findings and Recommendation. The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b).

When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1). *See also United States v. Bernhardt*, 840 F.2d 1441, 1444 (9th Cir. 1988); *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.* 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982). This Court has reviewed the pertinent portions of the record *de novo* and does not find any error in the Magistrate Judge's Findings and Recommendation.

CONCLUSION

The Court **ADOPTS** Magistrate Judge Stewart's Findings and Recommendation (#39) and, accordingly, **DENIES** the Petition for Writ of Habeas Corpus (#1).

IT IS SO ORDERED.

Dated this 2nd day of March, 2004.

/s/ Anna J. Brown
ANNA J. BROWN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RANDY JOSEPH MOORE,

Petitioner,

vs.

STANLEY CZERNIAK,

Respondent.

CV-01-01795-ST

JUDGMENT

Based on the record,

IT IS ORDERED AND ADJUDGED this action is dismissed with prejudice.

Dated this 2nd day of March, 2004.

/s/ Anna J. Brown
ANNA J. BROWN
United States District Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

RANDY JOSEPH MOORE,

Petitioner,

v.

JOAN PALMATEER, Superintendent, Oregon State Penitentiary,

Defendant.

Case No. 98C-15019

Honorable Terry A. Leggert

FINDINGS OF FACT, CONCLUSIONS OF LAW

This matter came before the Court and the Honorable Terry Ann Leggert for trial on petitioner's First Amended Petition for Post-Conviction Relief. Petitioner appeared in person and by his attorney, Steve Gorham, and defendant appeared by and through her attorney, Ward Douglas Marshall, Assistant Attorney General.

In this proceeding, petitioner contends that his conviction in Josephine County Case No. 96-CR-0118 is void and the subsequent sentence invalid in that the conviction was obtained in violation of his constitutional rights.

Specifically, petitioner claims that:

> The Petitioner's imprisonment is and was illegal and these proceedings resulted in a substantial denial of the Petitioner's rights in violation of ORS 138.530 in that Petitioner was denied the effective and adequate assistance of trial counsel under the Sixth and Fourteenth

Amendments to the Constitution of the United States and under Article I, section 11 of the Constitution of the State of Oregon in that Petitioner's trial counsel:

1. Failed to review Petitioner's statement to the police where investigators continued to question Petitioner despite his request for an attorney.
2. Failed to conduct an adequate and reasonable investigation into the law and facts of Petitioner's case by not employing an investigator and by failing to file a motion to suppress petitioner's confession to police.
3. Failed to ensure the Petitioner's plea of "No Contest" was freely, voluntarily, and intelligently made.
4. Failed to properly advise and counsel Petitioner regarding the ramifications of his "No Contest" plea.
5. Failed to object to the use of ORS 137.635 (determinate sentence) on the Judgment Order which clearly did not apply to Petitioner.
6. Failed to adequately advise Petitioner meaning of Post Prison Supervision in Felony Murder conviction.
7. Misadvised Petitioner that he would retain his Fifth Amendment privilege against self incrimination upon a plea of No Contest.

8. By advising Petitioner that if he did not take the plea his brother would also be charged with Felony Murder.

9. By coercing Petitioner into retaining his plea when he wanted to withdraw his No Contest plea.

10. Accepted an involuntary waiver of Petitioner's right to an indictment.

The Petitioner's imprisonment is and was illegal and these proceedings resulted in a substantial denial of the Petitioner's rights in violation of ORS 138.530 because Petitioner was denied the effective and adequate assistance of appellate counsel under the Sixth and Fourteenth Amendments of the United States Constitution and under Article I, section 11 of the Oregon State Constitution because Petitioner's appellate counsel:

1. Failed to raise the issue of trial court's application of ORS 137.165 [*sic*] where it was inapplicable to Petitioner and therefore illegal on its face.

The Petitioner's imprisonment is and was illegal and these proceedings resulted in a substantial denial of Petitioner's rights in violation of ORS 138.530 in that the trial court erred when it:

1. Accepted Petitioner's plea and entered judgment without properly determining whether the plea was freely, knowingly, intelligently, and voluntarily made.

2. Utilized ORS 137.635 (determinate sentence) on Petitioner's Judgment Order where it was not applicable to Petitioner.

The Court having considered the briefs, exhibits, testimony, and arguments of counsel, now makes the following:

FINDINGS OF FACT

1. Petitioner alleges trial counsel failed to review the statement he gave to the sheriff's office. The Court believes trial counsel's affidavit. In his affidavit, counsel states he read petitioner's statement many times and discussed it in detail with him. Petitioner assured counsel the statement was true and accurate. (Ex 108, Jordan Aff, p 1.)

2. Defendant established that petitioner was not in custody at the time he spoke to the sheriff's office. As a result, whether the sheriff's detectives continued to question petitioner after his alleged request for an attorney is irrelevant. Even if petitioner did invoke his right to counsel when he said he would like to talk to a lawyer, the detectives did not violate his state and federal constitutional rights when they continued speaking with petitioner because he was not in custody. *State v. Sadler*, 85 Or App 134, 139 n 5 (1987).

3. Determining custody is an objective test. The "only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 US 420, 442 (1984). Throughout petitioner's statement, the detectives repeatedly asked petitioner whether he was in custody or charged with a crime, which petitioner replied he

was not. (Ex 108, Jordan Aff, Att pp 1, 4, 8, 9.) The detectives also asked whether petitioner's statement was voluntary. Petitioner said it was. (Ex 108, Jordan Aff, Att pp 3, 6, 77, 78.) For example, prior to questioning petitioner and a co-defendant regarding particulars of the murder, the detectives asked the following questions:

> DW (Det. Whitehead): ...First off, um Randy you and Lonnie have come to the Sheriff's Office here voluntarily. Is that true or not true?
>
> RM (Randy Moore): Yes sir, it is true
>
> DW: OK. While you're here in the Sheriff's Office are either one of you in custody at this point?
>
> RM: No we're not
>
> LW (Lonny Woolhiser): No
>
> DW: Have either one of you been charged with any type of a crime?
>
> RM: No
>
> LW: Not at the present (laughter)

(Ex 108, Jordan Aff, Att pp 1-2.) From these questions, a reasonable man would believe he was not in custody. It is clear that petitioner knew this as well.

4. Petitioner's next allegation is twofold. He claims counsel failed in his investigation because he

did not employ an investigator and because he did not move to suppress petitioner's confession to the police.

As a preliminary matter, this Court must review petitioner's claims in the proper context. Petitioner's conviction stems from a plea of no contest. Because petitioner did not go to trial, he cannot expect his counsel to have conducted the sort of investigation necessary for purposes of a jury trial or trial to the court. In *Bickford v. Bachik,* 120 Or App 315, 852 P2d 878 (1993), the court held that when reviewing the petitioner's claim that his counsel had not adequately investigated prior to the petitioner's stipulated facts trial, the court noted,

> the relevant inquiry in this case is not, in the abstract, whether counsel should have investigated, but whether he adequately assisted petitioner in making an informed choice about the stipulated facts trial.

In accordance with the court's holding in *Bickford,* this Court's inquiry into petitioner's claim that counsel failed to investigate is actually an inquiry into whether counsel adequately assisted petitioner in making an informed decision regarding his plea. The record reflects he did.

Given the circumstances of the underlying case, counsel reasonably did not hire an investigator. Counsel reviewed extensive sheriff's office reports, reviewed the transcripts of voluntary confessions to detectives by petitioner and his co-defendants and discussed the case with petitioner at length. (Ex 108, Jordan Aff, pp 1-2.) Petitioner did not dispute any

material fact reported in the sheriff's office reports, including facts demonstrating petitioner and his co-defendants kidnapped the victim. (Ex 108, Jordan Aff, pp 2-3.) Rather, petitioner claimed only that he and his co-defendants killed the victim by accident. (Ex 108, Jordan Aff, p 2.)

5. Petitioner failed to prove by a preponderance of the evidence that counsel reasonably should have concluded that an investigator would have turned up evidence that would have been helpful to petitioner. As counsel noted in his affidavit, the evidence demonstrated the victim had been assaulted, bloodied, bound with duct tape, placed in the trunk of the car, taken to an isolated rural location, marched into the woods while still bound and shot. (Ex 108, Jordan Aff, p 3.) It is simply unlikely an investigator would have discovered evidence to support petitioner's claim that the victim's death had been accidental.

6. Similarly, petitioner failed to prove that he was prejudiced by counsel's decision not to hire an investigator. In order to show prejudice resulting from a failure to investigate, petitioner must show what counsel would have found had he investigated, and moreover, that the evidence would have affected the result of the proceeding. *Carias v. State of Oregon,* 148 Or. App. 540, 543 (1997). Unless petitioner offers evidence satisfying the requirements of *Carias*, his claim must fail.

7. The Court notes that counsel rebutted petitioner's complaint that counsel should have moved to suppress petitioner's confession. Counsel offered two reasons for not filing the motion. (Ex 108, Jordan Aff,

p 1.) Counsel asserts it was clear that petitioner was not in custody when he gave his confession, noting that petitioner "never believed that he was in custody and admitted to me that he realized he was not in custody when he and his brothers and another friend voluntarily came to the police department to give the recorded statement." (Ex 108, Jordan Aff, p 12.) Because petitioner was not in custody when he gave his statement, there was no basis for filing a motion to suppress.

8. Counsel further explains that he did not move to suppress because petitioner had previously confessed his participation in the crime to his brother (Raymond Moore) and another friend. Both Raymond Moore and the friend could have been called as witnesses to repeat petitioner's confession. (Ex 108, Jordan Aff, p 2.) A motion to suppress would have been fruitless.

9. The Court finds that there is very little chance that petitioner's confession would have been suppressed. Given petitioner's confession, counsel obtained the best plea offer he could for petitioner and petitioner accepted the offer after careful consideration.

10. The Court finds that petitioner's claims regarding his lack of understanding of the results and the nature of his plea are unfounded. Counsel's rendition of what occurred is substantiated by the lengthy colloquy between the trial court and the petitioner, as shown in the transcripts provided as an exhibit.

11. The Court finds that the mistake regarding which sentencing statute was applicable had no effect whatsoever on petitioner's sentence. Therefore, petitioner cannot prevail on this claim for post-conviction relief.

CONCLUSIONS OF LAW

1. Based on the findings of fact set forth above, in the underlying criminal proceedings resulting in petitioner's conviction, petitioner was not denied the right to assistance of counsel, as guaranteed by either the United States Constitution and as articulated by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984), or the Constitution of the State of Oregon.

2. Based on the findings of fact set forth above, in the direct appeal from the underlying criminal proceedings resulting in petitioner's conviction, petitioner was not denied the right to assistance of counsel, as guaranteed by either the United States Constitution and as articulated by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984), or the Constitution of the State of Oregon.

3. Petitioner's claims of trial court error are barred by *Palmer v. State of Oregon*, 318 Or 352 (1994), *Lerch v. Cupp*, 9 Or App 508 (1972), and *Hunter v. Maass*, 106 Or App 438 (1991).

4. Petitioner did not prove any of his claims by a preponderance of the evidence.

DATED this 19 day of June, 2000.

/s/ Terry A. Leggert
TERRY A. LEGGERT
CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

RANDY JOSEPH MOORE,

Petitioner,

v.

JOAN PALMATEER, Superintendent, Oregon State Penitentiary,

Defendant.

Case No. 98C-15019

Honorable Terry A. Leggert

JUDGMENT

The above case came on for trial on February 23, 2000 before the Honorable Terry Ann Leggert. Petitioner appeared in person and by his attorney, Steve Gorham, and defendant appeared by and through her attorney, Ward Douglas Marshall, Assistant Attorney General.

The Court having considered all evidence before it and, based on the Findings of Fact and Conclusions of Law separately entered,

NOW, THEREFORE, IT IS HEREBY ADJUDGED that petitioner's First Amended Petition for Post-Conviction Relief is denied, and this action is dismissed with petitioner taking no relief.

DATED this 19 day of June, 2000.

/s/ Terry A. Leggert
TERRY A. LEGGERT
CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JOSEPHINE COUNTY

STATE OF OREGON,

Plaintiff,

vs.

RANDY JOSEPH MOORE,

Defendant.

No. 96-CR-0118

INFORMATION

The defendant is accused by Timothy R. Thompson, District Attorney for Josephine County, by this information of the offense of:

MURDER WITH A FIREARM

(ORS 163.115/161.610 U Fel)

committed as follows:

The defendant, on or about December 7, 1995, in Josephine County, Oregon, did unlawfully and knowingly commit the crime of Kidnap in the First Degree and in the course of and in the furtherance of said crime which the said defendant was committing, a participant in said crime Randy Moore, said defendant, did cause the death of another human being, to-wit: Kenny Rogers, not a participant in the crime, by

shooting him and during the commission of this felony the defendant used a firearm, to wit: a .22 caliber revolver.

DATED: March 20, 1996.

TIMOTHY R. THOMPSON
DISTRICT ATTORNEY
BY: /s/ Scott K. Titzler
Scott K. Titzler #87362
Deputy District Attorney

DA #95-5191-F
GPS #95-12135
Whitehead
ZONE 5
DOB: 07-02-55
SSN: 542-72-3721
ADD: PO Box 64
Selma, OR

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JOSEPHINE COUNTY

STATE OF OREGON,

Plaintiff,

vs.

RANDY JOSEPH MOORE,

Defendant.

Case No. 96-CR-0118

CA No. A93317

BE IT REMEMBERED that the above-entitled cause came on for No Contest Hearing on March 20, 1996, in the Circuit Court of the State of Oregon, for the County of Josephine, at the County Courthouse, Grants Pass, Oregon, before the Honorable Gerald C. Neufeld, Circuit Judge, Presiding.

APPEARANCES

Mr. Scott K. Titzler, Deputy District Attorney for Josephine County, Oregon, for the Plaintiff.

Mr. Kim Jordan, Attorney at Law, Grants Pass, Oregon, for the Defendant

NO CONTEST HEARING

MARCH 20, 1996

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MARCH 20, 1996

- - -

THE COURT: Okay, is this State v. Randy Moore?

MR. JORDAN: It is, Your Honor.

MR. TITZLER: Judge, in that matter I have a Circuit Court information to file. And I believe (inaudible) Waiver of Presentment.

MR. JORDAN: Yes, Your Honor, the record should reflect that Mr. Moore has, and I have discussed, the Waiver the Presentment in this case, which is 96-CR-0118. And Mr. Moore is now signing it in open court. We tender the written waiver to the Court.

MR. TITZLER: I also tender the Circuit Court information. The Defendant has been provided a copy of that information, Judge.

THE COURT: Mr. Moore, I want to discuss with you this waiver that you just signed. And first of all I want to verify that that is your signature.

THE DEFENDANT: Yes, Your Honor.

THE COURT: And prior to your signing this did you have a chance to discuss this with your attorney?

THE DEFENDANT: Yes.

THE COURT: And was there anything in the document or anything as a result of your discussion that you had any question about this document?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you know what a grand jury is?

THE DEFENDANT: Yes.

THE COURT: Okay, why don't you in your own words explain to me what you think it is.

THE DEFENDANT: It's a panel of seven people from the community that sit down and review the evidence and see whether or not they have probable cause to indict me with a felony.

THE COURT: That's probably as good an explanation as I've had from a defendant. And it takes five out of the seven to come back with a true bill of indictment. And basically what you're doing by signing this document is you're giving up your right to have a grand jury of Josephine County consider the evidence in this case, and you're allowing the State to proceed into the Circuit Court without having to go through the grand jury. Is that your understanding?

THE DEFENDANT: Yes, Sir.

THE COURT: And kind of for the last time, are you sure that's what you want to do here?

THE DEFENDANT: Yes, Sir.

THE COURT: Okay, I'll receive the waiver. Okay, I have then the District Attorney's information, which is -- alleges the offense of murder with a firearm. Counsel's previously indicated that the Defendant's been given a copy of that. Have you gone over that with your client, Mr. Jordan?

MR. JORDAN: I have, Your Honor.

THE COURT: Okay, and do you wish to have the Court formally arraign, Mr. Moore?

MR. JORDAN: I think we probably ought to do that, thank you.

THE COURT: The information alleges that you, Mr. Moore, on or about December the 17th, 1995, in Josephine County, Oregon did unlawfully and knowingly commit the crime of kidnap in the first degree. And in the course of and in furtherance of said crime which the said Defendant was committing, a participant in said crime Randy Moore, said Defendant did cause the death of another human being, to wit Kenny Rogers not a participant in this crime, by shooting him. And during the commission of this felony the Defendant used a firearm, to wit a 22 caliber revolver.

My first question would be do you understand the charge?

THE DEFENDANT: Yes.

THE COURT: Okay, this is an unclassified felony. Have you checked, Mr. Titzler, to see what the maximums are that he could --

MR. TITZLER: The maximum sentence, Judge, would be a 25-year's sentence with life parole.

THE COURT: Okay. So do you understand what the maximum sentence is, Mr. Moore?

THE DEFENDANT: Yes.

THE COURT: Okay. Let me advise you of your constitutional rights. First of all Mr. Moore, do you understand that you have the right to remain silent?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you're not required to talk to me or anyone else about the circumstances of this offense?

THE DEFENDANT: Yes.

THE COURT: Do you understand that if you do make a statement, that information would be used against you at a later time such as a trial?

THE DEFENDANT: Yes.

THE COURT: You do have a right to an attorney and you have your attorney here, Mr. Jordan. Mr. Jordan are you Court appointed?

MR. JORDAN: Yes I am, Your Honor --

THE COURT: Okay.

MR. JORDAN: -- it's a special appointment.

THE COURT: All right. And finally, Mr. Moore, you do have a right to appeal any conviction or sentence that you would receive in connection with this case. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. It's my understanding that Mr. Moore is here today to enter a plea?

MR. JORDAN: He is, Your Honor. He is at this point executing a petition to enter a plea of no contest to this charge. I've previously signed it in court and Mr. Moore is signing it at this time. It contemplates by virtue of an addendum that he will plead no contest to felony murder.

Defendant understands that Measure 11 ORS 137.700 and ORS 163.115 provides for a determinate sentence of 300 months for this offense. No deduction or early release is available. However, this plea does not waive any right Defendant may have to except to or appeal from any sentence that (inaudible) the Court. I have tendered the Court that petition (inaudible) plea of no contest.

THE COURT: Okay at this time, Mr. Moore, what is your plea to the charge of felony murder with a firearm?

THE DEFENDANT: No contest.

THE COURT: I have here your petition to enter a plea of no contest. Is that your signature on the back of this document?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Prior to signing this document did you have a chance to go over it with your attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Was there anything in this document that you didn't understand?

THE DEFENDANT: No.

THE COURT: And Mr. Jordan just read from what's attached to your plea petition and it states that you will plead no contest to felony murder, that you understand that Measure 11, ORS 137.700 and ORS 163.115, provide for a determinate sentence of 300 months for this offense. No reduction or early release is available. However, this plead does not waive

any right that you might have to except to or appeal from any sentence imposed by the Court.

Do you understand the terms under which you're entering this plea?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has anyone promised you anything to get you to enter this plea?

THE DEFENDANT: Um -- not other than what's there.

THE COURT: Have you been pressured or coerced into entering this plea of no contest?

THE DEFENDANT: No.

THE COURT: Are you entering your plea of no contest freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: And a plea of no contest, Mr. Moore, means that you're not admitting or denying guilt, but you are going to receive a sentence the same as if you'd plead guilty.

THE DEFENDANT: Yes.

THE COURT: Okay. Now having been involved in a few of these cases, Mr. Moore, I want to make sure that you understand that there are rights that you're giving up here.

THE DEFENDANT: Okay.

THE COURT: The first of these is your right to have a trial by jury.

THE DEFENDANT: Yes.

THE COURT: And in order to convict you of this particular offense it would take a unanimous verdict, all twelve jurors would have to, after they had considered the evidence -- would have to agree in order to find you guilty.

THE DEFENDANT: Um, hum.

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And of course by entering a plea of no contest you understand that there isn't going to be a jury trial?

THE DEFENDANT: Yes.

THE COURT: And some of the things that go with that trial are your right to cross examine any witness that would testify or give evidence against you. You aren't going to have the ability or your attorney Mr. Jordan isn't going to have that ability. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Likewise, if you had witnesses to call, you're not going to have that opportunity to call those witnesses. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand that under our system of justice that you would not have to take the witness stand to testify if you didn't want to?

THE DEFENDANT: Yes.

THE COURT: And likewise, you don't have to present any evidence if you don't want to. That's your constitutional right.

THE DEFENDANT: Yes.

THE COURT: And you understand that no one could comment on the fact that you didn't testify or present any evidence and the jury could not consider that in their deliberation --

THE DEFENDANT: Yes.

THE COURT: -- Do you understand that?

THE DEFENDANT: --

THE COURT: Do you understand that in a case such as this, any criminal case, that the sole burden of proof is on the State of Oregon to establish your guilt beyond any reasonable doubt?

THE DEFENDANT: Yes.

THE COURT: And kind of what happens from this point on, Mr. Moore, is that once you've entered this plea of no contest the only way you can kind of take that back and reverse what's happening here right now, is for there to be a showing that you didn't enter your plea in a knowing, voluntary or intelligent way.

THE DEFENDANT: Yes.

THE COURT: And I've asked you questions thus far to help me form the opinion that you are entering your plea knowingly, voluntarily and intelligently.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. 'Cause once -- once we're through here today, it's going to be tough to take this back.

THE DEFENDANT: Yeah, I know that.

THE COURT: Okay.

MR. JORDAN: Your Honor, there is one thing I think that we should mention. In reading over ORS 163.115 the statute reads that the sentence for murder is life imprisonment with a minimum of 25 years. We have gone over the case law and are satisfied that the guidelines have superseded by implication have over -- have -- what's the right word -- revoked by implication. There's a number of cases that so hold the life sentence.

And Mr. Moore's plea as entered under the assumption and the -- well, it's -- it's entered in the expectation that his sentence will be 25 years and not life. And he would reserve the right, if he is sentenced by the Court to life, to withdraw his plea.

As we discussed this several times, and I think the District Attorney and myself as defense counsel are both convinced that life, even though it's on the books, is not an option in this case with Measure 11 and the guidelines and what not. But Mr. Moore wanted it -- that he was concerned with that wording being still in -- in it and wanted simply to give notice that he would withdraw his plea if he were sentenced to life imprisonment.

Does that explain his position?

THE COURT: Yes, it does. And --

MR. JORDAN: We did not --

THE COURT: -- would concur in that Mr. Titzler?

MR. TITZLER: The understanding of the State is that it's 25 years with life parole. And life imprison on this charge would not be an option as far sentencing goes.

MR. JORDAN: We did not want to seek the Court's prior approval of this because we didn't want -- avoid any -- we didn't want to give up any Appellate rights we might have by having part of the sentence being blessed by the Court. But I say that for Mr. Moore's comfort as it were at this point. I'm satisfied that life is not an option as well under the current law.

THE COURT: All right. Mr. Titzler, I think to make the record complete, I would ask the State to recite what the State's evidence would be in this case so that I may make a finding and if there is a factual basis.

MR. TITZLER: I'll do that.

On December 7 of 1995, Defendant Mr. Woolhiser, Defendant Mr. Moore and Defendant -- Co-Defendant Mr. Salyer were either related by blood or social acquaintances and had been so for some period of time. The victim Kenny Rogers was also a social acquaintance of the three Co-Defendants. And I'll recite these facts we if we can refer back with you the same facts for Mr. Woolhiser's situation as well.

Mr. Rogers, the victim in this case, lived in an RV in the Selma area and had some prior interaction

with Co-Defendant Salyer and was strongly suspected and implicated in the theft of some belongings of Mr. Salyer at his residence down in Store Gulch, a cabin that he was watching for the US Forestry (inaudible).

On this date, December 7, 1995, Mr. Rogers was at one point at his RV in the Selma area and Mr. Woolhiser, Mr. Moore and Mr. Salyer were in Mr. Woolhiser's home in the morning. Mr. Salyer raised the topic of concern about the victim having ripped him off previously. And it was the concerted decision of Mr. Woolhiser, Mr. Moore and Mr. Salyer to get in a borrowed car and drive out to Mr. Rogers' RV and basically instill in him the respect necessary to insure that he would not do this type of thing again.

The three Defendants then got in the car, drove out there. There's evidence to the effect that there was a pile of clothing in the back seat of the car when they arrived at Mr. Rogers' trailer. And there were also some other people present, at least initially, when the three Defendants arrived at the victim's trailer. They observed, at least some versions, four people in the car, three of whom got out of the car, one did not. And the State's position is that the person that did not get out of that car was the pile of clothing in the car.

Mr. Woolhiser had a – the 22 caliber pistol with him that he had previously purchase, in fact, from Kenny Rogers, the victim in this case. While Defendant Moore and Salyer stayed outside the RV, Salyer, in the area of the doorway so that he could see at

least a portion of the interior of the RV, and Moore just -- just down the side of the RV a little ways.

Mr. Woolhiser went into the RV, confronted the victim, struck him at least several times in the face causing significant injury to the face of Kenny Rogers; a severely broken nose, facial lacerations and other markings of physical violence in various locations on his face. There was excessive blood found at the crime scene.

Mr. Rogers had an abdominal hernia through which his lower bowel would extrude if he was not wearing a girdle or restraining belt that he otherwise would have in place. During the course of the fight or subsequent actions, that belt was dislodged. The evidence would be that he experienced significant pain from that abdominal hernia, particularly under the scenario where the girdle would be dislodged and the bowel was allowed to come out through the abdominal wall.

During the course of the assault in the trailer, the victim Kenny Rogers was at one point face down on the floor. His hands were drawn behind his back. Mr. Woolhiser requested something to bind his hands. Mr. Salyer went to the car that they'd arrived in and got some duck tape, brought it back to the trailer. Mr. Woolhiser used the duck tape to very tightly wrap and secure the hands of the victim behind the victim's back, which remained that way until his body was found on Hayes Hill.

And after the victim's hands were bound and -- and -- well, let me back up. At some point during the

assault in the trailer, the gun was at least brandished in the direction of the victim Kenny Rogers in the vicinity of his face, there's some dispute as to where exactly, but nonetheless it was used to -- at least in a menacing fashion at some point during the course of the assault.

After Mr. Rogers' hands were bound by the duck tape, he was assisted out of the trailer, perhaps partially on his own momentum, but also by the assistance of Mr. Moore, Mr. Salyer, who were outside the trailer. There was a need to assist him down the step onto the ground.

The three of them took him over to the truck of the car that they had arrived in. Mr. Salyer opened the trunk of the car, he had the key, he was the driver. The three of them assisted in putting Mr. Rogers in the truck of the car. His face, I believe, was facing forward, his head would have been to the right of the truck as you look towards the front of the car.

The trunk was closed, the three Defendants got in the car, drove it from the Selma area to the top of Hayes Hill taking the old 199 turnoff, the little windy road that goes along, I believe it's the east side of Hayes -- Hayes Hill Road or 199 Highway.

Went down that road not quite a mile and then pulled over into an opening, or a pull-out area on a curve, which opened up into a little draw which may have been an old skid road, but up the slope into a sort of a canyon area.

Mr. Rogers is still in the trunk at this point, still alive at this point. He was -- the trunk was opened at

the -- after they pulled over onto the side of the road. Tire tracks were found at the road that visually resembled the tires in the car. The car was recovered in California. In the back of the car was found blood in the truck. A hair sample that was visually comparable to that of the victim's.

The victim was then taken out of the truck by the Defendants at the side of the road, apparently had some difficulty standing at one point and took a header down to the ground. There were burrs along the side of the road there by the pull-out that grew and were found at the crime scene. And the same -- the same species of burr was also found throughout the long hair and ponytail of the victim. The victim apparently got back up either on his own accord or with assistance, his hands still bound behind his back.

Initially Mr. Woolhiser had the gun when they were out of the car. At some point during the course of walking the victim up this hill, this short little draw, up right to the edge of where the vegetation started, there was a bush kind of in the middle of the canyon and some overhanging branches. The gun was transferred to Mr. Moore.

The gun is a 22 caliber single-action revolver, six -- six shots in the cylinder. The gun was loaded. To some extent it was loaded. It had live round in it. Being a single-action revolver it was necessary for the gun to be cocked in order for it to fire. You could not pull the trigger and shot the gun without having previously cocked or pulled the hammer back.

The -- Mr. -- Mr. Woolhiser is -- is assisting the victim in walking up this draw. Mr. Moore is there also. The gun at some point is in the direction -- pointing in the direction with the hammer cocked in the direction of the victim's left temple.

It looks like the victim went down at some point and somewhere in there the muzzle of the 22 loaded, cocked revolver in the hand of Mr. Moore with the muzzle of that hit the left temple of the victim. The gun discharged. The bullet entered the left temple, proceeded in a slightly backward and upward direction through the brain and stopped just inside the -- the rear upper right corner of the skull before existing, did not exist.

The bullet was recovered. The gun was recovered where it was dumped, dumped in Selma by the Deer Creek bridge. The bullet matched -- in fact was fired from that gun. That gun was the same gun that Mr. Woolhiser had previously purchased from the victim.

Mr. Rogers was killed as a result of the shot to the head. The shot occurred at the location on Hayes Hill. He was not dead before he got there based on blood pattern, brain material observed at the crime scene, which would have been dislodged from the skull as a result of the gases entering the skull concomitant with the bullet because it was a partial or complete contact wound.

And his body was found there the following day by a passerby. The girdle had been dislodged from his hernia and the lower bowel had protruded into the --

into the sac of skin that protruded on the outside of the hernia.

This all happened in Josephine County on the date alleged and the fair inference from the facts is that Mr. Rogers did -- did not want to be transported in the manner that he was or to the destination that he was.

And, just something that I missed early on, the -- the indicated intent of the Defendants was to instill fear to the point that the victim would not again rip them off or rip any of their friends off, something to that affect.

THE COURT: The Court will find that there is a sufficient factual basis based on what the State feels their evidence would be for there to be a basis for the Court to receive this plea. And the Court has signed the order receiving Mr. Moore's plea.

MR. JORDAN: Your Honor, we expect to be filing a rather extensive briefs regarding the sentencing under the determine of sentencing law in order to lay a basis for appeal if the Court finds that that law is constitutional. And so we're probably going to need a reasonable period of time to get that done. If we could simply work that out with the docket clerk.

THE COURT: We'll make it to be set and you'll need to indicate what kind of time you're going to need to make your argument.

MR. JORDAN: Yes, I think I need to consult probably with Mr. Browne about that, and we'll do that right away.

THE COURT: All right.

MR. TITZLER: Just so the records (inaudible) Mr. Warren, he has a pending theft of rented property in this County. That will be dismissed upon sentencing and there may be some other infractions out there that we're going to look into and resolve as well.

THE COURT: All right.

OPPOSITION BRIEF

No. 09-658

IN THE SUPREME COURT
OF THE UNITED STATES

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

RANDY JOSEPH MOORE,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for The Ninth Circuit

Brief for Randy Joseph Moore in Opposition to Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether this case involves an ordinary application of *Hill v. Lockhart*, by the Court of Appeals in its conclusion, consistent with Mr. Moore's testimony in state post-conviction proceedings, that he would not have entered a plea of no contest if his attorney had filed a meritorious motion to suppress statements.

2. Whether this case involves an ordinary application of *Strickland v. Washington*, *Hill v. Lockhart,* and *Kimmelman v. Morrison* by the Court of Appeals in its discussion of *Arizona v. Fulminante*, as the substantive law relevant to its conclusion that Mr. Moore was prejudiced by his attorney's failure to seek suppression of a tape-recorded statement that was taken involuntarily and in violation of the assertion of the right to counsel.

3. Whether the State includes arguments in its Petition that the Court of Appeals properly found were waived and improperly seeks to retreat from what the Court of Appeals properly treated as a concession that the statement in issue was inadmissible.

4. Whether the State is seeking unwarranted error correction, contrary to this Court's Rules and in the absence of any error.

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The Opinion of the United States Court of Appeals is reported at 574 F.3d 1092 (9th Cir. 2009), and at page 1 of the Appendix. The Findings and Recommendation and Order in the district court are unreported and commence at pages 172 and 194 of the Appendix respectively.

JURISDICTION

This Court has jurisdiction to review the judgment of the court below by writ of certiorari pursuant to 28 U.S.C. §1254(1). The petition appears to have been timely filed, although it was not docketed until approximately two weeks after the filing deadline.

STATEMENT

The Petition for a Writ of Certiorari makes several assertions regarding factual development and rulings on the case below that require correction and response. Of primary importance, the Petition is based on the assertion that Mr. Moore never presented evidence that he would have rejected the plea offer or gone to trial if his attorney had successfully moved to suppress the tape-recorded statement taken by the police. Pet. at 8. To the contrary, Mr. Moore explicitly testified in the deposition taken during the state post-conviction proceedings that he wanted to withdraw his plea for multiple reasons related to his attorney's

failings, including the "Brightline rule" regarding questioning after the assertion of the right to counsel. Supp. App. at 23.

Throughout, the Petition distorts the opinion of the Court of Appeals. Contrary to the State's assertions, the Court of Appeals clearly relied on and analyzed the admissibility of the tape-recorded statement and the prejudice arising from Mr. Moore's counsel's failings under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart,* 474 U.S. 52 (1985). The Court of Appeals' analysis under *Arizona v. Fulminante*, 499 U.S. 279 (1991), was dictated by the holdings in *Strickland* and *Hill* and was secondary to its reliance on those cases.

Moreover, the Petition underplays or ignores several procedural issues that make a grant of certiorari in this case inappropriate. Specifically, the Petition underplays the finding that a motion to suppress the tape-recorded statement would have been granted and the State's failure to challenge that conclusion. The Petition also fails to advise this Court that it includes arguments that the Circuit properly held were waived.

Turning to the relevant facts, the record reflects that Mr. Moore made three statements about the crime, one to one of his brothers, one to a female friend (his co-defendant and half-brother's girlfriend, Debbie Ziegler), and the third, a detailed and tape-recorded statement that police took from him through improper

coercion and after he had asserted his right to counsel.[1] Both Mr. Moore's brother, Raymond, and Ms. Ziegler were allowed by the police to be present during their prolonged interrogation of Mr. Moore.[2] Contrary to the State's assertions, the information each knew before that time was far more limited than what was derived from the police interrogation. As Ms. Ziegler told the police, "I still don't know the actual thing." Supp. App. at 35. As Raymond Moore told the post-conviction court, "I'm not sure of all the exact details because this is basically hearsay." What he did know was what he had heard "in court" and "what they had basically told me after the incident, too, before I took them in, or on the way in." Supp. App. at 40.

Consistent with his belief that the death was accidental, Mr. Moore refused to plead guilty, but rather entered a plea of no contest. That no contest plea was induced by his attorney's failure, *inter alia*, to recognize that the taped statement that Mr. Moore gave to police that placed him at the scene and described his role

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[1]The presence of Raymond Moore and Ms. Ziegler during the taking of the involuntary tape-recorded statement may well render their testimony about any statements from Mr. Moore inadmissible as fruit of the poisonous tree. At the least, the State would be required to establish what each was told prior to the recorded statement.

[2]The co-defendant and Mr. Moore's half-brother, Lonnie Woolhiser, was also present during the interview.

in the offense, was taken not only in violation of his constitutional right to counsel, but was involuntarily given and inadmissible at trial for all purposes. Counsel's failing is particularly disturbing because the inadmissibility of the statement is so clear that the State did not contest the issue following the determination of the district court that the statement was inadmissible. The statement in the Petition that the State did not do so for strategic reasons is disingenuous and self-serving. Pet. at 31-32 n. 14.

In state post-conviction and federal habeas corpus proceedings, Mr. Moore asserted that he was deprived of his constitutional right to the effective assistance of counsel when his lawyer failed to recognize that a motion to suppress should have been filed. Supp. App. at 13-14, 17-18. Mr. Moore testified that his plea was induced by his lawyer's mistakes. Supp. App. at 23.

In responding to Mr. Moore's claims in the state post-conviction and federal habeas proceedings, the State made only one argument – that counsel's failing was not prejudicial because Mr. Moore had also made inculpatory statements to his brother and friend. The State asserted no other facts, sought to present no other evidence, and made no other arguments. For that reason, the Court of Appeals' decision necessarily involved a discussion of this Court's jurisprudence on harmlessness in *Fulminante*.

REASONS FOR DENYING THE PETITION

The Petition for a Writ of Certiorari should be rejected for four reasons. First, the Court of Appeals applied the clearly established law of this Court, as set out in *Hill*, in holding that Mr. Moore was prejudiced by his attorney's failings because there is a reasonable likelihood that he would not have entered a no contest plea if his attorney had filed the meritorious motion to suppress. Second, the court below broke no new ground. The Court of Appeals properly relied on *Strickland* and *Hill,* and its discussion of *Fulminante* was proper under the dictates of those cases and *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Third, the Petition ignores several procedural issues and includes arguments that the Court of Appeals properly held were waived by the State that render the case an inappropriate one for review by this Court. Fourth, the State's argument is essentially a call for error correction, contrary to this Court's rules and in the absence of any error.

I. The United States Court Of Appeals Followed And Properly Applied The Clearly Established Precedents Of This Court – *Strickland* And *Hill* – In Holding That There Is A Reasonable Probability That Mr. Moore Would Not Have Entered A No Contest Plea If His Attorney Had Filed The Meritorious Motion To Dismiss.

When a habeas petitioner alleges that his conviction is infirm because his lawyer was ineffective, a two-step analysis is required. First, did counsel's

performance fall below an objective standard of reasonableness? Second, was the petitioner prejudiced by his attorney's failings? *Strickland*, 466 U.S. at 687. Under *Hill*, in a case involving a plea, the question of prejudice is resolved by determining whether there is a reasonable probability that the petitioner would have gone to trial in the absence of his counsel's failings. 474 U.S. at 58-59.

The Court of Appeals understood and followed *Strickland* and *Hill*. At the outset of its discussion, the court stated: "The substantive federal law guiding our inquiry is supplied by *Strickland* . . ." App. at 18. The court then articulated the *Hill* standard for prejudice in a plea case. App. at 19. After stating the proper standard, the Court of Appeals reviewed the record and concluded in several places, "[t]here is at least a reasonable probability that, had his confession to the police been suppressed, Moore would have insisted on going to trial rather than pleading to the offense to which he did . . ." App. at 51. *See also* App. at 46, 52 n. 26.

A. Mr. Moore Testified That He Wanted To Withdraw His Plea Based On His Attorney's Erroneous Advice Regarding The Motion To Suppress.

The record fully supports the Court of Appeals' conclusion that counsel's failing on the motion to suppress was an important factor in Mr. Moore's decision to plead no contest. Mr. Moore testified in his deposition in the post-conviction

court that he wanted to withdraw his no contest plea because of the failings of his attorney, including his lawyer's failure to properly advise him about the "Brightline rule" requiring suppression of statements when a person has requested an attorney. The State references Mr. Moore's testimony in its Petition (Pet. at 8 n. 5) but, inexplicably, states simply that Mr. Moore only complained about life post-prison supervision. The full transcript reveals that Mr. Moore discussed his attorney's advice on post-prison supervision in the same breath as he discussed the motion to suppress:

Q: Why did you want to withdraw your no contest plea?

A: Because I was worried about the life post-prison supervision, and at this time I'd started going - - by that time I had started going to the legal library in the county and *we were reading Brightline rule* and stuff like that.

Q: *And what is the Brightline rule?*

A: The State said *once you ask for an attorney, all questioning must cease.*

Q: And I guess now we're getting into the indictment question. You're saying you didn't voluntarily waive your right to an indictment?

A: Not under all the information that the lawyer had given me at the time - -

Q: Did you - -

A: - - incorrect.

Q: But at the time immediately prior to your plea, you wanted to enter a plea; isn't that correct?

A: Immediately prior to my - - yes, under the information that I had been provided at the time by my attorney, I did. Under his advice.

Supp. App. at 23 (emphasis added). This testimony fully supports the finding that Mr. Moore, if properly advised regarding suppression, would not have entered the no contest plea.

B. The Full Record Supports The Court of Appeals' Decision On Prejudice.

In reviewing ineffective assistance of counsel claims in plea cases, scrutiny of the entire record is required to determine whether a person would have taken the plea he seeks to set aside in the absence of counsel's errors. While courts properly examine the petitioner's statements and formal allegations, the crux of the inquiry is broader and more penetrating. To assess whether the petitioner would have insisted on trial, courts examine the circumstances surrounding the plea. *See, e.g., Berkey v. United States* 318 F.3d 768, 772 -73 (7th Cir. 2003)("[a] mere allegation by the defendant that he would have insisted on going to trial is insufficient to establish prejudice. Berkey must establish through objective evidence that a reasonable probability exists that he would have gone to trial.") (internal citations omitted). Review of the full record supports the Court of

Appeals' careful analysis of the facts and circumstances and finding of a reasonable probability that Mr. Moore would not have pled no contest to murder had his lawyer recognized the inadmissability of the taped statement.

1. Mr. Moore did not admit guilt and sought to withdraw his plea when he became aware of his attorney's failings.

This record contains at least four distinct factors supporting Mr. Moore's testimony in the post-conviction deposition and the conclusion of the Court of Appeals. First, Mr. Moore has maintained throughout that the death of his friend was the result of an accidental shooting. Second, this case was not resolved on a traditional plea of guilty, but, rather, on a no contest plea, which supports the likelihood he would have proceeded to trial had he been properly advised. *Compare United States v. Peppers*, No. 06-1810, 2008 WL 934053, at **3 (3rd Cir. Apr. 8, 2008) (finding no likelihood that but for counsel's errors, petitioner would not have pleaded guilty, in that he "was emphatic at the plea hearing that he did not want to go through another trial."). Third, once Mr. Moore learned of his attorney's failings, he filed timely pleadings in the state and, later, the federal, courts to have his conviction set aside.

Finally, the facts show a viable defense to murder and reasons for declining the plea offer that led to the no contest plea. The State, through the dissenters

from the Court of Appeals' decision not to conduct *en banc* review, engages in a great deal of speculation about the facts. The record, however, demonstrates why Mr. Moore was wise in his reluctance to enter a plea to murder.

As the Court of Appeals pointed out, the plea offer made to Mr. Moore yielded the same conviction and sentence as received by the co-defendant, Salyer, who went to trial. App. at 32-33. There was, thus, little incentive given him to enter a plea. Moreover, another co-defendant, Mr. Woolhiser, was permitted to plead to manslaughter, a charge that carried a lesser sentence, and the charge that Mr. Moore believed more appropriately described his conduct. Supp. App. at 22, 41. As stated by Woolhiser's attorney at sentencing, all of the statements from all of the participants were to the effect that the shooting was accidental. Supp. App. at 6. As described by the prosecutor, the men were climbing a hill and, initially, Woolhiser had the gun. App. at 226. The victim slipped at least twice and fell; and the muzzle hit his temple and the gun discharged. App. at 227.

These facts fully support the Court of Appeals' conclusion.

2. The Court of Appeals' analysis does not create a new burden-shifting approach.

The State's arguments regarding burden-shifting and the absence of evidence from Mr. Moore that he would have proceeded to trial had counsel filed

the motion to suppress (Pet. at 28, 30) ignore both the facts of this case as discussed above and the settled law throughout the country. As stated above, settled law requires courts considering the question of prejudice under *Hill* to analyze the facts of the case in precisely the manner followed by the Court of Appeals in resolving Mr. Moore's case. The Court of Appeals placed no new burden on the State in reviewing the record.

The State's arguments also confuse the reasons why counsel did not file the motion to suppress with the reasons why his attorney believed a plea was advantageous in this case. As articulated by the Court of Appeals, counsel's advice on the merits of plea versus trial were fatally infected by his failure to recognize that the tape-recorded statement was not admissible for any purpose. App. at 33-34. The lawyer's advice was further tainted by his failure to recognize the substantial difference in probative value between a tape-recorded statement that allows a jury to hear a defendant's own voice as contrasted with the oral testimony of lay witnesses. App. at 44. The Court of Appeals' assessment of these issues is precisely the type of review of the record required by *Hill*.

II. The Court of Appeals Followed The Dictates Of *Strickland*, *Hill*, And *Kimmelman* In Discussing *Fulminante* As The Relevant Substantive Law.

A. Contrary To The Assertions In The Petition, The Decision Of The Court of Appeals Followed The Proper Precedents Of This Court.

The State's Petition distorts the opinion of the Court of Appeals. While recognizing that the Court of Appeals began its analysis with *Strickland* and *Hill*, the State then, incorrectly, asserts that the court identified *Fulminante*, rather than *Hill*, as the controlling authority for analyzing prejudice. Pet. at 12, App. at 18-19. That statement ignores several facts.

First, the State ignores the fact that *Strickland*; *Hill*, and *Kimmelman* require an assessment of the viability of a motion that was not filed in order to determine whether an attorney's performance fell below an objective standard of reasonableness. In cases involving the failure to file a motion, this Court has long held that the question of ineffectiveness cannot be addressed without considering the substantive merits of the motion that was not filed. *Kimmelman*, 477 U.S. at 375; App. at 21. While the habeas petition in *Kimmelman* followed a trial, the same type of analysis governs a habeas challenge to a guilty or no contest plea. *Hill*, 474 U.S. at 59.

After citing *Strickland*, the Court of Appeals engaged in the required assessment of the relevant law on the admissibility of statements.[3] App. at 23-38. It could not properly have done so in the circumstances of this case without analyzing the viability of a motion to suppress under established precedent. The Court of Appeals concluded that the statement was inadmissible both because it was involuntary, as found by the district court, and because it was taken in violation of Mr. Moore's right to counsel. App. at 24-25. After reaching that conclusion, the Court of Appeals turned to the question of prejudice.

The State's next mistake is ignoring the directive in *Hill* that analysis of prejudice requires the courts to assess the effects of the substantive error, *i.e.*, predict whether the error would have changed the outcome had there been a trial. *Hill*, 474 U.S. at 59. On the facts of this case, *Fulminante* is essential to *Hill*'s prejudice inquiry.

The State not only ignores the fact that *Hill* requires analysis under *Fulminante* on the facts of this case, but also the fact that, when the Court of Appeals turned to the question of prejudice under *Strickland*, it reiterated the

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[3]As noted by the Court of Appeals, where the State claims that "filing a motion to suppress, even if meritorious, would have served no useful purpose" because of other evidence, the analysis of substandard performance and prejudice substantially overlap. App. at 21 n. 7.

Strickland/Hill standard, and then applied it. App. at 38. Under that standard, the Court of Appeals was required to assess the extent of the harm from the failure to file the meritorious suppression motion. Pages 38-51 of the Appendix set out that analysis. Finally, the State ignores the fact that, at the conclusion of the required analysis of the substantive law, the Court of Appeals properly turned back to *Strickland/Hill* and held

> There is at least a reasonable probability that, had his confession to the police been suppressed, Moore would have insisted on going to trial rather than pleading to the offense to which he did . . . In light of these considerations, the only reasonable conclusion is that Moore has established *Strickland* prejudice.

App. at 51-52.

In this context, the State's assertion that "the court expressly identified *Arizona v. Fulminante* as the applicable 'clearly established' federal law that the state court failed to apply when reviewing Moore's claim of ineffective assistance of counsel" (Pet. at 12, 18, 19), makes the same mistakes as described above. The Court of Appeals was required to analyze the record under *Fulminante* because it governs the substantive law in issue, *i.e.*, it is the "clearly established" law on the harmfulness of a statement in the circumstances of this case. Moreover, the State ignores the Court of Appeals' recognition that consideration of *Fulminante* was

only one part of the required prejudice analysis. App. 38, 41, 46, 47, 51, 52, 58, 59.

The State's arguments regarding a difference in the standard to be applied in reviewing ineffective assistance of counsel in plea as opposed to trial cases reflect either a misunderstanding of *Hill* or simple disagreement with *Hill*. Pet. at 19-20. While there are differences between review in the two types of cases, there are no "fundamental differences" as the State suggests. Pet. at 19. Rather, as this Court holds, the prejudice inquiry will be very similar in both types of cases. *Hill*, 474 U.S. at 59. While the ultimate inquiry under *Hill* is whether the petitioner would likely have gone to trial, the habeas court cannot make that decision without assessing the alleged error of counsel to make a "prediction whether the evidence likely would have changed the outcome of a trial." *Id.*

None of the cases cited by the State limit *Hill* in any way. *United States v. Ruiz*, 536 U.S. 622 (2002), did not involve a challenge to the effectiveness of counsel. The only question addressed was whether the Constitution required the disclosure of impeaching information in a plea case. *Ruiz*, 536 U.S. at 625. Nor was any question of effectiveness of counsel raised in *United States v. Broce*, 488 U.S. 563 (1989), which involved the availability of a double jeopardy claim after entry of a plea of guilty. Finally, *Tollett v. Henderson*, 411 U.S. 258 (1973),

predated *Hill*, but reached a similar conclusion regarding the relevant inquiry: when counsel's effectiveness is challenged in a plea case, the courts are to ask whether counsel's advice fell "'outside the range of competence demanded of attorneys in criminal cases.'" 411 U.S. at 268.

When the State turns to the question of the applicable "clearly established Federal law" (Pet. at 21), it again misreads the decision of the Court of Appeals and the holdings of this Court. Because *Fulminante* explains how lower courts must determine whether admission of a confession was prejudicial, the Court of Appeals was required to apply it on the substantive issue regarding counsel's actions. That is what the Circuit did. It then applied the *Strickland/Hill* analysis to resolve the question of prejudice to Mr. Moore.

The State also ignores the arguments it made in the state post-conviction and federal habeas trial courts. In both, the State explicitly engaged in harmless error analysis that focused on the existence of the multiple statements. Its argument that Mr. Moore was not prejudiced was based on its view that the availability of the statements made to his brother and female friend rendered the failure to challenge the taped statement to police, a statement whose inadmissibility the State did not contest, harmless. That is the precise analysis required by *Fulminante*.

The Court of Appeals understood that this Court's holdings require it to assess the substantive law governing the area of counsel's performance that is alleged to be deficient and to assess the seriousness of the deficiency. Thus, in order to assess both competence and prejudice in a case in which the alleged error of counsel is the failure to file a motion to suppress, when the State alleges that the failure was not harmful, the relevant law must be applied. This Court set out the mode of analysis on this issue in *Fulminante*. 499 U.S. at 297-301. The Court of Appeals followed this Court's directive when it analyzed, under *Fulminante*, the error and resulting harm from admitting the tape-recorded statement the police had taken from Mr. Moore.

B. The Decision Of The Court of Appeals Follows The Same Analytic Approach Taken By The Other Circuits.

The analytic approach taken by the Court of Appeals in Mr. Moore's case is not only not in conflict with the approach taken by the other circuits (Pet. at 23), it is entirely consistent with their decisions. Review of cases from other circuits reveals the same analytic approach. The only difference is that the State generally prevails on ineffective assistance claims in plea cases.

The Seventh Circuit's decision in *Gilbert v. Merchant*, 488 F.3d 780 (7th Cir. 2007), is illustrative. *Gilbert* involved a juvenile who had pled guilty to first-

degree murder in Illinois. After exhausting state court remedies, he petitioned for a writ of federal habeas corpus "contending that his trial counsel was ineffective in failing to seek the suppression of his post-arrest statement, which acknowledged his involvement in the crime." *Id.* at 783.

In denying relief, the Seventh Circuit set forth its analysis. Applying both prongs of *Strickland* and *Hill*, the Court explained that "given that he was convicted based on his own plea, Gilbert was obliged to complete the demonstration of prejudice by showing that had his confession been suppressed, it is reasonably likely that he would have gone to trial rather than plead guilty." *Id.* at 791. The Court then wrote: "We turn first to the voluntariness of Gilbert's confession." In so doing, the Court cited, *inter alia*, several of this Court's decisions on voluntariness and confessions, particularly those pertaining to juveniles. It then applied the criteria enunciated in those cases to the facts of Gilbert's case, and held that the Illinois appellate court did not act "unreasonably in proceeding to assess the voluntariness of Gilbert's confession [.]" *Id.* at 792. In a passage highly germane to this case, the Court concluded:

> Gilbert's case for prejudice presumes that his confession would have been suppressed on his counsel's motion and that this would have so weakened the State's case that he likely would not have pleaded guilty. The Illinois Appellate Court's reasonable determination that

> his confession was voluntary precludes him from establishing prejudice in this way.

Id. at 795 (citation omitted).

Other circuits adhere to the same analytical approach. *See Iron Wing v. United States*, 34 F.3d 662, 664-65 (8th Cir. 1994) (rejecting ineffective assistance challenge to guilty plea, and holding that counsel's failure to move to suppress rifle was not ineffective; as part of its *Hill* analysis, Court applies Fourth Amendment consent principle of *Illinois v. Rodriquez*, 497 U.S. 177 (1990)); *Savino v. Murray*, 82 F.3d 593, 599-600 (4th Cir. 1996) (rejecting ineffective assistance challenge to guilty plea, and holding that trial counsel's advice that motion to suppress confession "was unlikely to succeed" was reasonable; Court applies, *inter alia*, *Edwards v. Arizona*, 451 U.S. 477 (1981), and its progeny, and concludes: "Applying the existing law to these facts, we find that it was reasonable for Savino's attorneys to conclude that their client had voluntarily reinitiated contact with the police."); *Ward v. Dretke*, 420 F.3d 479, 486-89 (5th Cir. 2005) (holding that counsel was not ineffective "in failing to challenge the search and seizure of [petitioner's] computer files prior to his guilty plea"; in analyzing claim under *Hill*, Court applies, *inter alia, Wong Sun v. United States*, 371 U.S. 471 (1963)).

C. The State's Argument That The Court of Appeals Decision Will Affect A Significant Number Of Decisions Is Incorrect.

The response to the State's argument that the Court of Appeals' approach will significantly alter the manner in which post-conviction proceedings are held starts and ends with the decision in *Hill*. There, this Court made clear that the lower courts must analyze the available facts to determine whether prejudice exists. What the State complains about as "repeated speculation" (Pet. at 27-28), is, rather, the analysis required by *Hill*. There is no burden shifting.

III. The Petition Underplays Or Ignores Several Procedural Issues That Militate Against Granting Certiorari.

In its Petition, the State suggests that the inadmissibility of the statement at issue may be in question. Pet. at 31, n 14. The Court of Appeals explicitly found, however, that the State's failure to contest the finding of the district court on the question of voluntariness was a concession. App. at 23-24, 33. The State should not be permitted to take a contrary position at this stage. *See United States v. Galletti*, 541 U.S. 114, 120 n. 2 (2004) (holding respondents forfeited argument in Supreme Court by failing to raise it in courts below); *Muhammad v. Close*, 540 U.S. 749, 755 (2004) (same); *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005) (holding issues not raised by party in brief are waived); *Whaley v.*

Belleque, 520 F.3d 997, 1002 (9th Cir. 2008) (criticizing state for taking inconsistent positions).

A second procedural issue arises from the fact that in the lower courts, the State's sole argument on prejudice was that Mr. Moore was not prejudiced because he had made confessions to two people in addition to his taped confession to the police. App. at 39. As noted by the Court of Appeals in its opinion, the State at no point argued anything about other evidence in the State's possession "that would have caused Moore to accept the plea rather than go to trial." App. at 40. This was true in the federal litigation as well as the state litigation.

The Court of Appeals found the State's failure to argue other facts or theories constituted a waiver. The court stated, "the state's failure to raise below the argument that counsel's failure to move to suppress the taped confession was harmless for reasons other than the existence of the two informal confessions precludes us from considering that argument on this appeal." App. at 55-56. That holding is consistent with this Court's holding and the long standing view of the Court of Appeals. *See Galletti*, *supra; Kama*, *supra*. In this context, it is inappropriate for the State to now argue for the first time in this Court, based on the speculations of the dissenters from *en banc* review, that there is a wealth of

other information that would have informed Mr. Moore's decision to plead guilty or no contest regardless.

IV. This Court Does Not Sit As An Error Correcting Court And, In Any Event, The Court of Appeals Did Not Err.

A. Error Correction Is Not An Appropriate Reason To Seek Or Grant Certiorari.

The essence of the second question presented by the State is that it disagrees with the Court of Appeals' view of the harm befalling Mr. Moore from the failings of his attorney. Rule 10 of the Supreme Court Rules describes the "character of the reasons" the Court considers when acting on a petition for certiorari. The Rule concludes that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The State's disagreement with the Court of Appeals' application of *Hill* is not a basis on which certiorari should be granted.

B. The State's Description Of The Underlying Facts Of This Case Distorts The Record.

The State's Petition inaccurately presents the Court of Appeals' analysis of the relevant legal issues as set out above. It also distorts the record of the underlying facts.

This case is best described by the trial judge who sentenced Mr. Moore as one that "has got several tragedies within it . . . the tragedy here is this was a person that was apparently a friend of yours . . . you have been able to live in the community pretty much crime free . . . the thing just got out of hand." Supp. App. at 8-9.

Mr. Moore has always denied his culpability for murder in the death of Kenneth Rogers. Mr. Moore was part of a group of friends who had been drinking and then decided to scare one of their buddies who had burglarized one of the other men's homes. App. at 222-23. While admitting his participation in Rogers' kidnapping, Mr. Moore has maintained from the outset that the death was accidental. Even the prosecutor's words at the time of the plea suggest an accident. App. at 227. As the prosecutor stated at Mr. Moore's sentencing, "they were going to take [Mr. Rogers] out into the woods, release him and let him walk home, basically to put the fear of God in him at least." Supp. App. at 4.

Mr. Moore made three statements: to his brother, a friend, and the police. The statement taken by the police was detailed and tape-recorded. It was inadmissible because it was involuntary and also because it was taken after Mr. Moore asserted his right to counsel. Mr. Moore's lawyer failed to recognize that a viable motion to suppress should have been filed and the distinction among the

three statements. Mr. Moore reluctantly entered a plea of no contest because his attorney failed to properly advise and advocate for him. The state post-conviction court unreasonably determined that the tape-recorded statement was admissible.

The district court concluded that the statement was involuntarily taken. The Court of Appeals properly applied *Strickland*, *Hill*, *Kimmelman*, and *Fulminante* in concluding that Mr. Moore was prejudiced by his attorneys failure to move to suppress the inadmissible statement. There is no error to correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted this 6 day of January, 2010.

Steven T. Wax

Steven T. Wax
Counsel for Respondent

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF JOSEPHINE

* * *

STATE OF OREGON,

Plaintiff,

vs.

RANDY JOSEPH MOORE,

Defendant.

Case No. 96-CR-0118

CA No. A93317

BE IT REMEMBERED that the above-entitled cause came on for Motion to Strike and Sentencing on May 1, 1996, in the Circuit Court of the State of Oregon, for the County of Josephine, at the County Courthouse, Grants Pass, Oregon, before the Honorable Gerald C. Neufeld, Circuit Judge, Presiding.

APPEARANCES

Mr. Scott K. Titzler, Deputy District Attorney for Josephine County, Oregon, for the Plaintiff.

Mr. Kim Jordan, Attorney at Law, Grants Pass, Oregon, for the Defendant.

MOTION TO STRIKE & SENTENCING

MAY 1, 1996

RESPONDENT'S EXHIBIT 106

MR. JORDAN: No, thank you. Mr. Moore does not desire to make a statement, Your Honor.

THE COURT: You had nothing, Mr. --

(The Court's microphone is barely audible.)

MR. TITZLER: No, Judge.

THE COURT: All right. Then Mr. Titzler I think we're down to the time of sentencing. Do you have some comments you'd like to make regarding that?

MR. TITZLER: Thank you, Judge. Does Your Honor wish a recap of the facts or do you recall them from the time of plea.

THE COURT: I think it would be safe to say that I recall them generally. And that doesn't help you very much. It -- you know, we're not really pressed for time here so it probably wouldn't hurt to go over the facts.

MR. TITZLER: Judge, on the day of the incident, December 7 of 1995, the -- a -- Mr. Woolhiser and Mr. Moore, Mr. Salyer and Mr. Rogers, the victim and decedent in the case, were, if not related, at least friends on a social basis, perhaps closer in some situations.

On that particular date, or prior to that date, the decedent Mr. Rogers was suspected of having burglarized the home of Story Gulch -- actually a cabin of

Story Gulch that Mr. Salyer lived in and also poked the tires of Mr. Salyer's car.

Early in the morning of December 7, Mr. Woolhiser, Mr. Moore and Mr. Salyer were all together in Mr. Woolhiser's house. There was discussion about Mr. Rogers having done this vandalism to the cabin and the car and it was decided that the three of them; Moore, Woolhiser, and Salyer, would go to Mr. Rogers' trailer where he lived, it was actually an RV, and confront him about this vandalism of the cabin.

On the way to Mr. Rogers' house, at least with regards to Mr. Salyer's statement, they stopped the car, the license plates were covered up with duck tape, and there's some evidence that clothing was removed from the trunk of the car, a basket of clothing, and put in the back seat.

They got to Mr. Rogers' residence and at this point the statements of all three Defendants were to the effect that they were in the range of a five on a scale of one to ten, one being stone cold sober and ten being falling down drunk.

Mr. Woolhiser went into the trailer. Mr. Rogers was there. He struck Mr. Rogers several times in the face with his fist. Mr. Woolhiser brought a gun, a 22 revolver with him, chrome plated or nickel plated. That gun

was taken out and at least brandished in the direction of the face of Mr. Rogers in the trailer.

At some point Mr. Rogers ended up face down on the trailer floor with his hands behind his back. Mr. Salyer got the duck tape from the car that they had driven to the scene. The hands of Mr. Rogers were taped behind his back very tightly.

Mr. Rogers was then taken out of the trailer and half carried or half walked to the trunk of the car. Salyer opens the trunk of the car. Several of the Defendants get Mr. Rogers into the trunk of the car. The trunk is closed. They get in the car.

Mr. Salyer drives to Hayes Hill. They take the old Hayes Hill cutoff. And the intent at this point was to rough up Mr. Rogers, teach him a lesson about treating friends or family in the manner that he treated Roy Salyer's cabin. They were going to take him out into the woods, release him and let him walk home, basically, to put the fear of God in him at least.

They got to a pullout on the old Hayes Hill highway. They got out -- all three got out of the car. They got Mr. Rogers out of the trunk of the car. The gun was still at this point in the possession of Mr. Woolhiser. Mr. Rogers fell at this point, hands still taped behind his back, did a head plant off the side of the road, he got back

got accompanying cases for Woolhiser and Moore, both of which will be dismissed on sentencing. The -- there's a contempt of Court arising out of the wood products case 93-0855M for Mr. Woolhiser and then 96-0283M for Mr. Moore, theft of rented property. And I have dismissals for the "F" cases also.

THE COURT: Ms. Browne.

MS. BROWNE: Judge, I think the majority of the information that we wanted to present to the Court we have done so through an offer of proof. The Court has before it my client's record. And under the sentencing guidelines my client of course would be serving a much less sentence assuming Your Honor followed the guidelines and sentenced my client as such.

The -- under Measure 11 of course he would not be eligible for good time and there are a number of programs that he will be prevented from participating in. It's a difficult situation I guess at this point because defense counsel always feels as though they should be arguing the mitigating circumstances and because of the circumvention of -- created by Measure 11 that's not possible.

We would ask, however, that the Court take into consideration the rendition of facts given by Mr. Titzler both this time and at the earlier time when the plea

was entered.

The shooting here as all of the statements have indicated -- that we've received, have indicated that the shooting was an accidental one. The situation has been a very difficult one for my client to accept, to acknowledge and to step forward and speak to the police about, and also to step forward and to take the plea offer to -- to enter the agreement that's been presented to the Court.

And it's been a hard thing for him to understand, and I think for all of the family to understand as well; the concept of felony murder and how it could apply in a situation where at least the majority of the information would indicate that it was an accidental shooting.

We would ask that the Court take into consideration all of the information that's been adduced here for the Court and as well the fact that my client has virtually no record at all. The -- believe it was the Larceny occurred when my client was 17. And the other, the wood -- wood products was a dispute over -- over firewood. Other than that there is no record. So the penalty that -- that would be exacted by Measure 11 is -- well, don't argue it, right?

We would ask that the Court take all of that into consideration and I guess other than that we have

nothing to add. My client again does not wish to address the Court at this point as he feels that there would be no effective right of allocution as the Court has no ability to consider mitigation.

THE COURT: Mr. Jordan, anything you'd like to say on behalf of your client, Mr. Moore?

MR. JORDAN: No, I think not, Your Honor, other than to say that it was very difficult for Mr. Moore to accept the fact the felony murder could occur under these circumstances because he -- he too, in all of his statements made to the police and to me, indicated that the shooting of Kenny Rogers was just a -- a pure accident. And I think that Mr. Moore has throughout -- at all of this, once he came to the realization that that's what the law really said and that's what it really meant, has been accepting of that.

And his concern has very largely been for his brother and for other members of the family -- than himself. He's -- his position has always been that he knew what had happened was wrong and he was going to have to pay for it. He's been very dismayed at the Measure 11 -- the harshness of Measure 11, but he has never attempted to sidestep the notion that he's done wrong and he was going to have to pay for it. And his -- as I say his concern has been largely for his brother and his family.

With that comment I would say we're ready to

be sentenced.

THE COURT: All right. Let me start with the sentencing of Mr. Woolhiser first. And I guess your attorney has stated Mr. Woolhiser that you did not at this point wish to address the Court. I just want to hear those words from you.

THE DEFENDANT: That's true.

THE COURT: I'd guess I'd like to just say something to Ray Moore. I don't remember saying what I said to you. It sounds like something I probably would say and I'm glad you made me eat my words.

MR. MOORE: I'm glad that I was able to do that. Sorry about that, by the way, Your Honor.

THE COURT: This case, and I don't have to tell you folks this -- this case has got several tragedies within it.

The first tragedy of course is I think anytime we see a loss of life like this, it's a tragedy. And what makes it even more tragic is this was an unnecessary loss of life. You know if you're in a car accident and your number's kind of up, that's a tragedy and sometimes those things just can't be avoided.

The tragedy here is this was a person that apparently was a friend of yours. He was treated kind of like a member of the family and winds up dying. And then

there's the tragedy I guess that -- I guess that the impact that this has on you. The two of you have been able to live in the community, for the most part no serious problems, pretty much crime free; and here you're looking at spending really the prime of your life in prison for something that I think you've probably thought about a hundred times, all of which could have been avoided. It just didn't need to happened, and here we are. The thing just got out of hand.

And then we have thrown into the mix of all this the effect of Measure 11. And the consequences are extremely serious. And you know I -- I guess the word for it is it's tragic and from your point of view it was stupidity, absolute stupidity, and I'm sure you've thought about that a hundred times. There's probably fifty or sixty times along the way that the course of events that happened here could have been changed. And the thing went to its ultimate conclusion and that conclusion was this.

Count-1 on Mr. Woolhiser is Manslaughter in the first degree. The Court will sentence per Measure 11 and 137.700 to the 120 months.

Per the agreement the Count-2, which is the Kidnapping in the first degree with a firearm, the sentence would be 90 months. That would be a consecutive sentence. Again that's per the stipulation of the parties. There would be with Count-2 the firearm minimum, 161.610, of 5 years

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

RANDY JOSEPH MOORE,

Petitioner,

vs.

MITCH MORROW, Acting Superintendent, Oregon State Penitentiary,

Defendant.

No. 98C-150

COPY

DEPOSITION OF RANDY JOSEPH MOORE

BE IT REMEMBERED that the deposition of Randy Joseph Moore was taken for the defendant, pursuant to stipulation hereinafter set out, before Martin Hauge, Certified Court Reporter for the State of Oregon, on October 28, 1999, beginning at the hour of 2:30 p.m. at the Oregon State Penitentiary, 2605 State Street, Salem, Oregon.

APPEARANCES

Steven H. Gorham, Attorney at Law, representing the Petitioner;

Stephanie Andrus, Assistant Attorney General, representing the Defendant.

STIPULATION

(At said time and place the following stipulation was entered into between the attorneys present in behalf of the respective parties:)

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective attorneys, that the deposition of Randy Joseph Moore may be taken before Martin Hauge, a Certified Shorthand Reporter for Oregon, at this time and place, on oral interrogatories, direct and cross, to be propounded to said witness as by law provided.

IT IS FURTHER STIPULATED AND AGREED that all irregularities as to notice of time and place and manner of taking said deposition are hereby waived, each party reserving the right to object at the time of trial to any question or answer as to the competency, relevancy or materiality thereof, but that objections as to the form of the questions and responsiveness of answers must be made at the time of taking said deposition or shall be deemed to be waived.

IT IS FURTHER STIPULATED that the reading and signing of said deposition by the witness are hereby expressly waived.

RANDY JOSEPH MOORE

was thereupon called as a witness, and having been first duly sworn by the Court Reporter, was examined and testified as follows:

EXAMINATION

BY MS. ANDRUS:

Q. Mr. Moore, I'm from the Department of Justice. I'm here to take your deposition regarding the petition for post-conviction relief that you filed challenging your conviction from Josephine County. If I'm correct, you're complaining about your attorney Kimmie Jordan?

A. Yes.

Q. All right. What I'm going to do is go through your petition, essentially through the allegations that you have made and ask you to explain them so I can understand them. But before we start, I will ask if you're taking any medicine that might impair your ability to understand my questions?

A. No.

Q. Okay. I'm actually going to start with your second claim which is that your counsel failed to conduct an adequate and reasonable

investigation. And what do you think he should have investigated?

A. All the evidence as to the tire tracks.

Q. Do you dispute that you were not in the car?

A. No.

Q. You do not dispute that?

A. No.

Q. Do you dispute that Mr. Woolhiser -- and who was your other co-defendant, Mr. Salyer?

A. Mr. Salyer.

Q. Do you dispute that you kidnapped the victim?

A. No, not now.

Q. So what would investigation of the tire tracks have done?

A. It would have shown that they didn't have evidence to prove that we were there.

Q. I guess that goes back to your first question. Your first one, you're saying that your confession to the crime should have been thrown out?

A. Uh-huh (affirmative).

Q. Well, if you had confessed the crime, why would your counsel go investigating for evidence

that would establish that you weren't there?

A. He didn't investigate anything, even our statements. He didn't even know of what we said in our statements.

Q. Were they transcribed?

A. Yes, they were.

Q. And you're saying he didn't get a transcribed copy?

A. I'm saying that when I asked him about them, he said he hadn't had time to go over them.

Q. When was that?

A. After the sentencing.

Q. Okay. I'm going to go back to your first claim. You're saying that you asked for an attorney?

A. Yes.

Q. Can you point out in the transcript where you asked for an attorney?

A. On page 2 of the deposition I believe it is.

Q. Page 2 of the transcript?

A. Of the transcript.

MR. GORHAM: Do you have one?

MS. ANDRUS: Yes.

Q. (BY MS. ANDRUS) Page 2?

A. I believe it's page 2.
Q. Why don't you point out to me where you think you asked for an attorney.
A. Which one is this? Is this the first one or the second? Is that the first or the second one? They have two sets. Actually there was one meeting and they divided it up into two transcripts.
Q. This is on December 20th, 1995.
A. What time?
Q. At 3:10 in the afternoon.
A. 3:10? Okay, that should be the first one.
Q. So there's one before that?
A. No, that's the first one.
Q. So there should be a second transcript?
A. Yeah, they say another meeting, but it's the first meeting where I asked for an attorney.
I don't see it here. I don't see it on page 2.
Q. Okay.
A. Let's see here. This has -- he has in the petition, the copy that he gave me shows it. In the memorandum that you got it shows me the page number and.....

MR. GORHAM: I don't have it with me, but suffice it to say, Mr. Moore, you told and you believe it's in the transcripts someplace.

THE WITNESS: Yes, it's in the transcripts.

MR. GORHAM: Whether you're accurate whether it's page 2 or 20 or whatever.

THE WITNESS: It's in the first few pages because the first -- they have 1 through 14 is one meeting and then they start all over again. It's the second meeting --

Q. (BY MS. ANDRUS) I'm sorry to interrupt you. And you're saying it's in the second one?

A. It's in the 1 through 14, the first meeting around 3:00.

Q. What if I give you page 1 through 14 and you tell me where it is, which is the first meeting at 3:10. This is the first meeting, 1 through 14.

A. On page 3.

Q. On page 3 where you say. . .

A. Right down by your finger.

Q. Okay. All right.

MR. GORHAM: Why don't you read it for the record.

MS. ANDRUS: I think I would have to read

it in context. It would be about page 2, it would be about 2 pages.

MR. GORHAM: Okay.

Q. (BY MS. ANDRUS) So now let's move to your claim again. You asked about your investigation. You're saying your counsel should have investigated. You started by saying he should have investigated tire tracks to show that you weren't there?

A. Yeah, to show that they didn't have evidence to prove that we were there.

Q. What else should he have investigated?

A. The photo lineup.

Q. What photo lineup is that?

A. Where he showed -- the detective showed our photographs to -- I can't remember the lady's name where she identified me where he showed her three photographs of me, my brother, Ron E. Woolhiser and Roy Salyer after our pictures had been in the paper and on T.V.

Q. And was this woman a woman who is standing next to the victim's R.V.?

A. She was in a car, I guess. I never seen her.

Q. What else should he have investigated?

A. Our statements.
Q. To see if there was some basis to suppress?
A. Yeah. And he did not file no motions for omnibus hearings or nothing.
Q. Is there anything else?
A. About where the detectives told me that if it was an accident, they would go before the D.A. on my behalf and see to it that I was charged with an accident. And when he did go to the D.A. to make sure the D.A. didn't jam me for later on down the road, he came back. And then after we told him those statements, they charged us with murder anyhow.
Q. Which detective was that?
A. Whitehead and Carol Huffman.
Q. And what else should he have investigated?
A. Basically that's about all I can think of right now.
Q. You allege that your counsel failed to ensure that your no contest plea was freely and voluntarily given. Why do you think it was not?
A. Because he informed me that I was possibility of the death penalty on an accidental

death which was not possible. And that if I did take the deal, that they would reduce the charges on my brother; but if I didn't, they would go after the death penalty, possibly aggravated murder, possibly the death penalty on me, my brother, and my co-defendant Roy.

Q. So when you entered your plea, you thought you were entering your plea to escape the imposition of the death penalty?

A. Uh-huh (affirmative). And aggravated murder.

Q. So that's the primary reason why you feel it was not knowing?

A. Yeah, that.

Q. Did you understand when you entered your plea that you would not have a trial?

A. Yes, I understood that.

Q. But essentially you just thought that you might get the death penalty?

A. Yeah, I was faced with aggravated murder according to my attorney.

Q. You allege your counsel failed to adequately advise you regarding the ramifications of your plea. What did you not know about?

A. That after I was -- entered a plea of no

contest, they could force me to testify.

Q. You believe that if you entered a no contest plea --

A. I would not have to testify against my brother or my co-defendant.

Q. Did you testify against your co-defendant?

A. They attempted to make me testify and I refused and the D.A. dropped the charges. Well, the Judge wanted to give me contempt.

Q. But you didn't receive contempt; isn't that correct?

A. No, because the D.A. dropped the charges, dropped it.

Q. So, in fact, you were not forced to testify against your brother; is that correct?

A. No, I was not.

Q. Is there any other consequence of your no contest plea that you think that you were not advised of?

A. Well, my Denny Smith.

Q. You were not aware of Denny Smith?

A. I was not aware that I was even eligible for it. As a matter of fact, I was told I was not eligible for it.

Q. But you got it?

A. But they gave it to me anyhow, and my attorney didn't object to that.

MR. GORHAM: And he's probably not legally eligible for it.

THE WITNESS: And then my life in prison, life post-prison supervision, I was worried about that. And my attorney informed me that after three years I could have it dismissed.

Q. (BY MS. ANDRUS) And now you have life. Any other consequence you were not aware of?

A. That's about all for now.

Q. Did you discuss with your counsel specifically the post-prison supervision?

A. Yes, and it's even in the sentencing transcripts where I was hesitant and the Judge, the D.A. and my counsel talked me into taking the deal, saying that it was not a life sentence.

Q. You're saying that you wouldn't have taken the deal if you had known that?

A. If I would have known I could be stuck with it the rest of my life, yes, when I took the deal.

Q. What's this about your brother? Was your brother charged with any crime?

A. He was the co-defendant, Ron Woolhiser is my brother.

Q. And he was charged with felony murder; is that correct?

A. They reduced it when I took the deal to manslaughter and kidnapping.

Q. What was he charged with originally?

A. Originally we were held on manslaughter, kidnapping and assault.

Q. And then you were reindicted for felony murder?

A. I guess at the sentencing, at the plea hearing I was reindicted just for that alone.

Q. So you're saying your counsel advised you that if you didn't take the plea, then your brother wouldn't be able to get manslaughter, he would get something higher?

A. The D.A. would go for possibly aggravated murder on all three of us.

Q. And that's what your counsel told you?

A. Yes. He told me 25 years was a good deal.

Q. So you believe that what you did had some consequence on your brother?

A. Yes.

Q. Why did you want to withdraw your no contest plea?

A. Because I was worried about the life post-prison supervision, and at this time I'd started going -- by that time I had started going to the legal library in the county and we were reading Brightline rule and stuff like that.

Q. And what is the Brightline rule?

A. The State said once you ask for an attorney, all questioning must cease.

Q. And I guess now we're getting into the indictment question. You're saying you didn't voluntarily waive your right to an indictment?

A. Not under all the information that the lawyer had given me at the time --

Q. Did you --

A. -- incorrect.

Q. But at the time immediately prior to your plea, you wanted to enter a plea; isn't that correct?

A. Immediately prior to my -- yes, under the information that I had been provided at the time by my attorney, I did. Under his advice.

MS. ANDRUS: I have no further questions.

MR. GORHAM: I think I will. I'm going

to take a short break.

(Recess.)

EXAMINATION

BY MR. GORHAM:

Q. You had another brother other than the brother you were accused of doing this crime with; is that correct?

A. Yes.

Q. What was his name?

A. Ray Moore. He was in the -- present at the interrogation.

Q. And was he involved in some sort of crime before the crime that we're talking about?

A. Yeah, in '83 he was involved in a shooting where two people died and another person was shot in the neck and wounded.

Q. And at that time or at some point was he an informant for the police?

A. Yes, he was.

Q. And at some point during the crime that he was involved with, not this crime but the crime that he was involved with, did he get some sort of deal?

A. Yes, from Dutch Whitehead and Carol

Huffman, they had a warrant out for his arrest to shoot on sight, dangerous because of the killings. But when he made a statement to them and turned it in, they dropped all charges.

Q. And how did that affect your interrogation?

A. Well, the night -- prior to this interrogation when they took us to county jail in the police car, we invoked our Fifth Amendment rights. They said, well, they'd release us that night if we'd promise to go see our brother Ray in the morning and come in with him the following day.

Q. Did you do that?

A. Yes, we were supposed be in at 1:00, but we couldn't find an attorney in Medford to take our case. So we called them at 1:00 to tell them we'd be in later, and they said if we were not there at 3:00, that they would come and get us and we would not like the way they came and got us. So at 3:00 we came in with our brother Ray.

Q. Did they make some statement to you to get you to talk while your brother Ray was there?

A. Yes, they said if it was an accident like we talked the previous night, they would go to bat for me like they went to bat for my brother Ray.

Q. And did that influence your deciding to talk?

A. Oh, yeah, it did because, you know, that's what I wanted to hear to let them know, okay, they're going to help me out here, you know.

Q. And did they?

A. No, they did not.

MR. GORHAM: That's all the questions I have.

MS. ANDRUS: I have no further questions.

(Deposition Concluded)

Certificate

STATE OF OREGON)
) ss.
County of Marion)

I, Martin Hauge, a Certified Shorthand Reporter for Oregon, certify that, pursuant to stipulation for counsel for the respective parties hereinafter set forth, Randy Joseph Moore personally appeared before me at the time and place set forth in the caption hereof; that at said time and place I reported in stenotype all testimony adduced and other oral proceedings had in the foregoing matter; that thereafter my notes were reduced to typewriting by me, and the foregoing reporter's transcript, consisting of 17 consecutive pages, constitutes a full, true and accurate record of such testimony adduced and oral proceedings had and of the whole thereof.

Witness my hand at Salem, Oregon, this 8th day of November, 1999.

Martin Hauge

Martin Hauge, Court Reporter
CSR No. 90-0089

.INTERVIEW WITH RAY MOORE, RANDY MOORE, RONNY WOOLHISER, AND DEBBIE ZIEGLER.

by Det. Sgt Ron Goodpasture, Det. Dutch Whitehead, and Det. Carroll Huffman
December 20, 1995

RAY - RAY MOORE
RM - RANDY MOORE
RW - RONNY WOOLHISER
DZ - DEBBIE ZIEGLER
DW - DET. DUTCH WHITEHEAD
RG - DET. SGT. RON GOODPASTURE
CH - DET. CARROLL HUFFMAN

RG: Okay, let's start. Today is December 20. I'm Ron Goodpasture, it's 3:10 in the afternoon. This conversation is being tape recorded. In the room is ah Det. Whitehead, Det. Huffman, myself, Ray Moore, Randy Moore, Lonnie Woolhiser, and Debbie Ziegler. Ah, we're here to ah discuss this matter of the murder of Kenneth Rogers, and everybody here is fully aware that the conversation is being tape recorded. Let the record reflect everybody is nodding their head yes. (Laugh) So anyway, ah you guys had some questions for us?

LW: Well yeah we want to know, we just want to know what we are being charge with and...

RG: Well, you haven't been charged with anything yet. When and if we arrest you, then you'll be charged. And we've told you I think that probably the charge will be ah murder. ??? one time ??? something close to that.

RAY: Was the other person involved or, or allegedly involved, uh, charged?

RG: I don't know if you guys want to address that issue or not.

ATTACHMENT

DISCOVERY - COMPLIED WITH

.INTERVIEW WITH RAY MOORE, RANDY MOORE, RONNY WOOLHISER, AND DEBBIE ZIEGLER.

by Det. Sgt Ron Goodpasture, Det. Dutch Whitehead, and Det. Carroll Huffman
December 20, 1995

DW Well, it doesn't matter, it doesn't matter, why you, you'll find out, yes, he's charged, he's in jail.

LW: I knew that last night, more or less.

RAY: Yeah, that's what we surmised.

RAY: Yeah, um, I can't really speak for my brothers, but I knew there are things that they would like to discuss, that they're worried their welfare and the manner in which, what they'd like to discuss would reflect on them and that is the purpose that they, they've showed me interest in an attorney, 'cause they're, they're kinda scared.

DW: Oh, I can understand that and as far as...

CH: _____ understandable.

DW: ...yeah, and as far as what the concerns are for your welfare, okay? We don't know if we can help you until we find out what they are.

RM: Well I think you have a pretty good idea.

DW: What?

RM: I mean as far as the c[illegible]ments you made last night, I think you have a pretty good idea ___? of what really happened _____??

DW: Yeah...

RM: You see....

RM .....until I, I have to be able to talk to somebody that's on my side, you know, for me, to be able to go tell nobody, _____? I don't trust my judgement right now.

CH: You seem pretty upset, that's understandable.

RAY 'Cause the individual involved was a friend of his

CH: We uh, we understand that, you know.

[illegible]
[illegible] 1996

INTERVIEW WITH RAY MOORE, RANDY MOORE, RONNY WOOLHISER, AND DEBBIE ZIEGLER

by Det. Sgt Ron Goodpasture, Det. Dutch Whitehead, and Det. Carroll Huffman
December 20, 1995

RAY: And uh, you know like they, they know that, that there's something that's going to come out of this, okay, something has to. They, you know, people have made beds that have to be slept in, you know.

DW: That's very true.

RAY: And, uh...

DW: Sometimes when people make a bed that they sleep in, it doesn't hurt to take that bed and straighten it up once in a while.

RAY: That's exactly right.

DW: And the only people that can straighten up their own bed are, of course, is the person that just slept in it, they can come back and straighten their bed up some, and sometimes it makes the bed look better.

RAY: Exactly. I agree completely. You know, um,

CH: Even if you get, really in a lot _____? wait until we can sit down with you and..

KW: You know, we'd just like to talk to somebody, you know

CH: Yeah.

RM: As quick as possible, talk to a lawyer, so

CH: I know.

RM: I believe he's going to say what I want him to????

RAY: If there was some way we could maybe get an attorney in here for a consultation..

DW: Well.

RAY: ...real quickly..

DW: There's, there's only two ways that you're going to be able to ....

DW: One is to charge him and you go to arraignments and you get formally charged and if you don't have the money to afford an attorney, which I think you, that's already been discussed, then one will be appointed to represent you.

DISCOVERY
COMPLIED WITH

.INTERVIEW WITH RAY MOORE, RANDY MOORE, RONNY WOOLHISER, AND DEBBIE ZIEGLER.

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December 20, 1995

??: Alright.

DW: Okay. That's it. The other way is, and I think that's already been brought up prior to the recording being turned on, you said that, they wanted too doggone much money and none of you have that kind of money.

RAY: Yeah, and that's their concern, to be honest, is the money. You know, with the attorneys and our concern is having justice served properly.

CH: And,.....???

DW: That's our concern.

CH: _____ is the fact that _____

DW: I think that between these gentlemen here and the other people we've talked to, all we've ever told anybody all we want is the truth.

CH: Yeah, and like I said, you know, like you're aware, you know you think that we know what the story is and stuff and you know, things get out of hand ___?

DW: And as, as you, as you well know, when we talked with you guys, we told you that we would go to bat for you as long as we got the truth.

RM: See that's what I want to hear.

DW: Okay.

??: _____?

DW: And that's understandable, we understand that also, okay?

RAY: I know in my, this is for myself, saying, there was once an officer, and I said hey, look, I want out, I did something and been doing something. I want out of this, I want a chance. And this officer said, okay, Ray, I'll go to bat for you. And that officer's your captain, laughs.

CH: But he did go to bat for you _____???

RAY: That's exactly right.

.INTERVIEW WITH RAY MOORE, RANDY MOORE, RONNY WOOLHISER, AND DEBBIE ZIEGLER.
by Det. Sgt Ron Goodpasture, Det. Dutch Whitehead, and Det. Carroll Huffman
December 20, 1995

DW: You knew what it took...

RAY: I talked to him and he stood behind his word one hundred percent and he's probably one of the best friends I have in the world.

CH: And it's the same with us, we can't go to bat for you, I mean we can't do our best for you until we can sit down and lay up, lay all, lay the cards out, and.

DW: It's be like, it'd be like us getting up to bat in the world series without a bat in our hands.

RAY: Or know what team you're batting against.

CH: So, you know that's, I mean , _____?? we can, decision's got to be made, I guess, I know.

RAY: Decision's here. If you guys want to wait for an attorney, then do it. If, if this guy ???? tells you to wait for an attorney, then do it. Do you think that you can....

RM: I think I can straighten it up by just worrying about getting him hurt, too much.

RAY: Well, you're not going...

LW: That's neither here nor there, I know.

CH: You're not going to hurt _____?? You got to take care of yourself, first, okay, and Lonnie, Lonnie understands that. Lonnie's got to take care of himself.

DW: You know last night we talked we could see the real closeness, okay, and that is a rare commodity nowadays in this world, lot of people don't have the closeness you guys have got.

CH: Take a man to do what you guys are doing.

DW: I agree with that. The thing is, you said you'd like to straighten this thing out, and you can do so but you don't want to get Lonnie hurt.

RM: Uh-huh.

DW: Okay. Not until we can turn around and take what you're going to say to straighten things out, got to the D.A.'s office, and ask about Lonnie's behalf. The same thing goes with Lonnie, whatever he says, if he doesn't want to get you hurt, he turns around and tells us,

DISCOVERY
COMPLIED WITH

.INTERVIEW WITH RAY MOORE, RANDY MOORE, RONNY WOOLHISER, AND DEBBIE ZIEGLER.
by Det. Sgt Ron Goodpasture, Det. Dutch Whitehead, and Det. Carroll Huffman
December 20, 1995

---

we got things that we know that we can corroborate what you're telling us is the truth, we'd go to the D.A. for Lonnie on your behalf. Okay? Carroll and I both told both of you guys that the other night, we would go to bat for you as long as we got the truth.

CH: I mean we can't do that until we know...

RM: Well, should I...

LW: Might as well.

CH: ?????

DW: Hold on a second. You've already, you've already said that you wanted an attorney. Here and on this tape recorder your changing your mind and you're willing to talk with us.

RM: Yes.

DW: Okay, so that you know you're going to get a fair shake from us alright, I want to verify that with our DA that he is not going and turn around and jam you. I want him to tell me right now on the phone that you can change your mind and he will accept it. So there's no jammin' down the road, okay?

RM: Okay.

DW: So give me a minute and let me go call him.

CH: Get some slips too out your..

DW: Okay.

CH: You okay with this?

??: ???

CH: Hey, we respect you guys for coming in. And you know, we believed you last night. Take a man to admit that he made a mistake.

??: _____??

CH: Hard thing to do. But, once you make that step then life starts over for you.

??: _____??

DISCOVERY COMPLIED WITH
JAN 22 1996

CH Do you know where Bo and Vicky went?

RM No

DZ No

RM No I have no idea

DZ No

LW They just said they were gettin cuz

RM He he pretty well guessed what's went on and he didn't want to be here for no questions or nothing

RM He said he was wanted

DZ I just figured they they were

RM I understand that you know cuz he was (unreadable/covered)

DZ (unreadable) hadn't known em long. I didn't think anything of it

DW We understand that while everyone is down at the ranch for the barbeque there was a beer run made Saturday night and then I believe it was Ed and Roy that made the beer run and when they came back they brought a newspaper with them because the lady at the store had said that you know that uh it was in the paper about Ken

LW Uh hum

DW K? When that newspaper was brought back to the ranch and that article was read and everybody knew that Ken's body'd been found, was there any discussion about it at all

LW Well everybody we just kind of you know played it (unreadable)

? Yep

LW We didn't know nothin about it

LW We didn't even know nothing about it and

LW it was a shame and all that kind of stuff you know an

DISCOVERY
COMPLIED WITH
JAN 22 1996

DW OK

RM Didn't want to get anybody else in trouble, you know, enough people

DZ I didn't know until we'd read the paper and I still didn't know the actual thing

RM Yea but everybody's basically guessing but nobody ever got (unreadable/covered) by it

DZ (at same time as above line) everybody was just talking about how he and Kenny and reminiscing and we you know

RM Loose lips sink ships

DZ how could it you know

RM I was scared (unreadable) hoping like I said I was hoping you'd look the other way but I I knew he (unreadable/covered) but I wasn't going to run

DZ (same time as above line) how could it happen (unreadable) cuz he hitchhiked all the time, he drank all the time

DW That was the general conversation then?

DZ Yea nothing you know

DW OK. You got anything else Carroll?

CH No. Do you have anything you wanta say Lonnie?

LW Uh, other than the fact that it was an accident man, it wasn't it wasn't planned it was

CH How do you feel about what happened?

LW Feel like shit

CH Randy, you want anything you want to say

RM It will never be the same

CH Lonnie was just getting into a nice relationship with a lady

DW OK. I um I don't have any anything else at this point that I want to ask, um uh I'm sure there's gonna be a other questions that will come up on you know for you guys, there'll be

DISCREPANCY
COMPARED WITH
JAN 2 5 1996

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

RANDY JOSEPH MOORE, Petitioner,	)	
v.	)	No. 98C-15019
JOAN PALMATEER, Superintendent, Oregon State Penitentiary, Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED That, pursuant to notice duly given to all parties in interest, the above-entitled cause came on regularly for trial in the Circuit Court of the State of Oregon for the County of Marion, at Salem, on the 23rd day of July, 2000, the Honorable Terry Ann Leggert presiding.

APPEARANCES

Mr. Steven H. Gorham, Attorney at Law, appeared on behalf of the Petitioner

Mr. Ward Douglas Marshall, Assistant Attorney General, appeared on behalf of the Defendant.

Transcribed by:
Robin Curl
Court Transcriber
1127 42nd Place N.W.
Salem, OR 97304
(503)362-9261

response, we'll give you two weeks to do that. Just let us know if you are actually going to respond to it. Okay?

MR. MARSHALL: Okay. Thank you, Your Honor.

THE COURT: Thank you. All right. With that, are you ready to proceed?

MS. SAGER-KOTTRE: Yes, we are, Your Honor.

THE COURT: Okay.

MS. SAGER-KOTTRE: We would call Raymond Moore.

THE COURT: Mr. Moore, if you'd stand forward. Come all the way up here, please, and raise your right hand.

RAYMOND MOORE,

was thereupon produced as a witness and having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

THE CLERK: Please be seated and when you're seated, state your name and spell your last name for the record, please.

THE WITNESS: My name is Raymond Leon

I had no idea what. When I did show up over there -- because I dropped everything and got off work and headed right over and I talked to them at Lonnie's house at which time they basically ran down to me the scenario that had occurred and asked me what they should do.

Q And what did you tell them?

A I told them that we had three options. One option, they run and which at some point they would be caught and the odds are that they would be killed. Number two, they try playing it off and, you know, hope that they didn't get caught.

THE COURT: What do you mean, playing it off?

THE WITNESS: Play it off like they didn't have anything to do with it, you know, they didn't know anything about it. Knowing my brother Randy, that was impossible. Randy has -- he's got a conscience that's just --

THE COURT: I'm just still trying to figure out what the term is. So what you mean is just act like you didn't know anything about it?

THE WITNESS: Yeah. Act like you didn't know anything, you know, deny everything.

THE COURT: Okay. And would they have told you they did know something about it so you couldn't

play it off?

THE WITNESS: Not really at that time. They just told me what -- that the police officers had picked them up the day before in regards to a murder and that they let them go until they talked to me because they wanted some advice from someone.

THE COURT: Okay. Go ahead. I just -- I need to understand your terminology.

THE WITNESS: Oh, you bet. Yeah.

THE COURT: Okay. Go ahead. And then the third option. You said --

THE WITNESS: And then the third option was to stand up like men and be accountable. If it was an accident like they had told me, then they would have nothing to worry about. The police department had worked well with me and I believed that they would do the same with them if they had told them.

BY MS. SAGER-KOTTRE: (Continuing)

Q What was your -- what is your relationship with Lonnie Wilhiser, just to clarify?

A Lonnie Wilhiser -- it's hard for me to say. He's my stepbrother. In my family we don't have steps, okay. My father adopted him, he's my brother. Okay. Lonnie more or less has idolized me in a sense for -- since his childhood. I was a motorcycle ride and ornery

discharged. I'm not sure of all the exact details because this is basically hearsay. It's what was stated in court and it's what they had basically told me after the incident, too, before I took them in, or on the way in. Had it not been the way it was -- I mean, Randy's not violent at all. I haven't even known Randy to get into fights, you know. Had it been Lonnie, I might have had another thought, just like had it been me, I may have had other thoughts on it, you know. And I love them both dearly, okay, but I have a bad temper and Lonnie has a similar, but with Randy, there's no way I could believe anything else.

BY MR. MARSHALL: (Continuing)

Q It's correct, isn't it, sir, that they actually beat up Mr. Rogers before they put him in the trunk?

A Yes, they did. I heard that they did beat him up up there at the -- his RV when they first got there with this third party, Roy, I believe.

Q And then they duct taped him and shoved him in the trunk?

A Yes, to my understanding.

Q And took him out on the country road?

A Yes. This country road they're talking about runs beside a main highway, kind of -- it's the old Highway 99 is what it is, and it's maybe five miles long,

Honor.

THE COURT: Okay.

MS. SAGER-KOTTRE: Just one question.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MS. SAGER-KOTTRE:

Q In your mind, what -- what charge is an accident death? What crime is that?

A Manslaughter, Criminal Negligent Homicide.

MS. SAGER-KOTTRE: Nothing further, Your Honor.

THE COURT: Thank you. You may step down. Okay. I just want to clarify one thing in the briefing. I guess there's -- occasionally the Petitioners use 137.165 and there's 137.635 -- I think it's 137.635 that we're operating on -- on that error in terms of --

MR. GORHAM: Yes, Your Honor. If you were reading the draft memo, I know we put it in two different ways and that's one of the things I'm going to make sure is corrected.

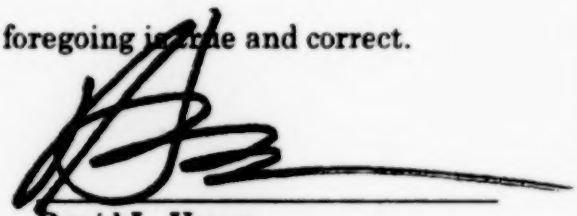
THE COURT: Good. The respondent has just said he, assuming for the purpose of briefing, is that you were operating under 137.635 so I just wanted to clarify that too.

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I certify that one copy of the Petition for Writ of Certiorari in *Carlos Rashad Gould v. United States of America*, No. 09-_____ was served via UPS overnight delivery on all parties required:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N. W.
Washington, DC 20530-0001
(202) 514-2203
Counsel for Respondent

I declare under penalty of perjury that the foregoing is true and correct.



David L. Horan
Counsel for Petitioner

Date: October 16, 2009

REPLY BRIEF

No. 09-658

In the Supreme Court of the United States

JEFF PREMO, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

RANDY JOSEPH MOORE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF

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B. Moore has not identified any other circuit decision that applies *Fulminante* in the manner used by the Ninth Circuit in this case.....8

C. The procedural issues raised by Moore do not preclude review by this Court. 10

D. The superintendent's petition does not ask this court to engage in error correction; but if the superintendent is correct, he also is entitled to relief on the merits. 11

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REPLY BRIEF

Petitioner, Jeff Premo, Superintendent, Oregon State Penitentiary (the superintendent), has asked this Court to review the Ninth Circuit's announcement that *Arizona v. Fulminante*, 499 U.S. 279 (1991), is clearly established federal law for purposes of determining, in a federal habeas corpus case, whether a trial attorney's failure to move to suppress a confession prejudiced a defendant who pleaded guilty or no contest. In response, Moore argues that the Ninth Circuit simply applied *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), and did nothing out of the ordinary with *Fulminante*. But his response actually highlights both the Ninth Circuit's error and the impact this decision will have on many collateral proceedings.

In addition, Moore makes a number of assertions about what the record proves. This reply will address only some of Moore's claims about the facts, but the superintendent's decision not to argue about all of Moore's factual assertions is not a concession that his description of the evidence, or what that evidence proves, is accurate. The multiple opinions in this case show that there is very little agreement about the facts, and the state court's factual findings, which should have been paramount in this federal habeas corpus case, have been lost in the shuffle. But the

evidence is largely irrelevant for purposes of the main question presented in the superintendent's petition, and disputes over the facts should not preclude granting the superintendent's petition.

A. Moore does not explain how *Fulminante* is relevant to the question of whether a trial attorney's conduct affected a defendant's decision to plead guilty or no contest, nor how a *Fulminante* analysis can be conducted without a trial record to review.

Moore's explanation of the Ninth Circuit's use of *Fulminante* tracks as follows. First, the court recognized *Strickland* and *Hill* as the controlling authorities for assessing whether a petitioner who pleaded guilty or no contest was prejudiced by his attorney's failure to move to suppress a confession. Second, when a petitioner contends that his attorney should have filed a motion to suppress, part of the *Hill* analysis requires the reviewing court to determine the likelihood of success for that motion. (Brief in Opp. 12-16). The superintendent agrees with both of those premises. However, the parties disagree about the final step of Moore's argument and the Ninth Circuit's approach.

Moore argues that *Strickland* and *Hill* required the Ninth Circuit to "assess the extent of the harm from the failure to file the meritorious

suppression motion" and that *Fulminante* "is the 'clearly established' law on the harmfulness of a statement in the circumstances of this case." (Brief in Opp. 14). This is where the Ninth Circuit went astray. The district court had already ruled that Moore's confession to police was involuntary[1] (App. 188-90), and the superintendent did not challenge that part of the district court's ruling on appeal. App. 3. The Ninth Circuit should simply have assumed that the motion to suppress would have succeeded and then determined whether Moore would have insisted on going to trial if counsel had filed the motion. The court should not have conducted its *Fulminante* analysis.

The harmless-error analysis announced in *Fulminante* simply does not apply to a case like

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[1] The district court nonetheless denied relief, ruling that Moore's trial counsel reasonably chose not to file the motion because Moore's two other confessions would have been admissible if he had chosen to go to trial. The court noted both the state post-conviction court's factual findings and the evidence supporting those findings, including evidence that Moore told his brother, Raymond, and Debbie Ziegler the same story he told the police, and that that conversation took place before the police interview. App. 190-92. The court also pointed to evidence that codefendant Roy Salyer was cooperating with the police by the time that Moore made his confession. App. 191.

this, in which a federal habeas petitioner seeks collateral review of convictions that were obtained by a plea of guilty or no contest. As explained in the superintendent's petition, *Fulminante* instructs that, on direct review of a claim that a trial court erroneously admitted a confession, the appellate court "*simply reviews the remainder of the evidence against the defendant* to determine whether the admission of the confession was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 310-11 (emphasis added). When a criminal defendant pleads guilty or no contest, of course, there is no trial and therefore no evidentiary record for later review. Thus, in a collateral review, such as a state post-conviction or federal habeas corpus proceeding, there is no record to use for a proper *Fulminante* analysis.[2]

Moore's response does not grapple with the real-world difficulties of applying *Fulminante* in

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[2] Moore's assertion that the superintendent "ignored" the Ninth Circuit's reliance on *Strickland* and *Hill*, and the requirements set out in those opinions (Brief in Opp. 12-14), is both incorrect and irrelevant. The superintendent acknowledges that the Ninth Circuit began, and ended, its analysis with *Strickland* and *Hill*. The point of the petition, however, is that the Ninth Circuit injected *Fulminante* into the prejudice analysis.

collateral proceedings, as the Ninth Circuit now requires. For example, in this case, because Moore pleaded no contest, the available evidence for a *Fulminante* harmless-error analysis consists only of bits and pieces of testimony that undoubtedly would have been developed further had the case actually gone to trial. Contrary to Moore's assertion that the state offered "the precise analysis required by *Fulminante*" to the state post-conviction court (Brief in Opp. 16), the post-conviction court could not have conducted a *Fulminante* analysis, because no trial took place in the underlying criminal case. Rather, the state argued and the state post-conviction court found—albeit with an unfortunate lack of precision—that the availability of two other witnesses to testify about petitioner's full confession rendered any motion to suppress petitioner's confession to police "fruitless." That finding is separate from the court's ruling that there was "very little chance" that Moore's confession would have been suppressed. *See* App. 205. Thus, while it is unclear exactly what the state court meant by "fruitless," that finding is broad enough to encompass a finding that Moore would not have insisted on going to trial if his counsel had moved to suppress his confession.[3]

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[3] That understanding of the state court's ruling is consistent with its additional finding that Moore's

The portion of Moore's deposition testimony that he identifies as sufficient to demonstrate prejudice under *Hill*—that he wanted to withdraw his no-contest plea because, at some unspecified time, he had been reading about the "Brightline rule," which requires police to stop questioning a person in custody if they ask for an attorney (Supp. App. 14)—falls far short of proving either that he wanted his attorney to move to suppress his confession or that he would have insisted on going to trial if his attorney had filed the motion. If that was what he meant, he easily could have, and should have, said so as the first step toward carrying his burden of proving that he was prejudiced by his attorney's failure to file the motion to suppress.[4]

"claims regarding his lack of understanding of the results and the nature of his plea are unfounded." App. 205. That finding, in turn, is supported by the trial attorney's testimony about his extensive discussions with Moore about the comparative risks and benefits of going to trial or accepting the state's plea offer (App. 69-77) and by the change-of-plea transcript. App. 211-29.

[4] Further, Moore's testimony on this point lacks credibility because, as part of the plea bargain, the state agreed not to present the case to the grand jury. That presentment could easily have led to additional charges (both codefendants were convicted of multiple offenses), and perhaps more-serious charges than the

Although Moore never plainly testified that he would have insisted on going to trial if his attorney had moved to suppress his confession to police, he now contends that four factors support a conclusion that he probably would have rejected the plea offer if his attorney had filed the motion. (Brief in Opp. 9-10). None of them has weight. First, Moore's contention that the shooting was an accident, even if true, still leaves him guilty of exactly the crime to which he pleaded no contest: felony murder. *See* Or. Rev. Stat. § 163.115(1)(b) (murder includes an unintentional killing committed during commission of, or flight from, another felony). Second, that Moore pleaded no contest rather than guilty tells us nothing about whether he would have insisted on going to trial if his attorney had filed the motion. Third, his assertion that he timely sought to challenge his

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single count of felony murder to which Moore pleaded no contest. Evidence, described by the prosecutor at the change-of-plea hearing, that the victim died from a contact wound to his temple, fired from a gun that had to be cocked before it would fire (App. 226-27), could persuade a rational juror that the shooting was intentional, not accidental as Moore claimed. If a jury believed that Moore shot the victim intentionally, he could have been convicted of aggravated felony murder. Or. Rev. Stat. § 163.095(2)(d) (felony murder constitutes aggravated murder if committed personally and intentionally).

conviction proves nothing—unless we are to assume that mere filing proves the allegations. Fourth, although Moore asserts that "the facts show a viable defense to murder," he does not identify any such defense, and the superintendent cannot discern one.

B. Moore has not identified any other circuit decision that applies *Fulminante* in the manner used by the Ninth Circuit in this case.

Moore cites opinions from the Seventh, Eighth, Fourth, and Fifth Circuits to argue that the Ninth Circuit is not alone in the procedure it used in this case. (Brief in Opp. 17-19). The Ninth Circuit used *Fulminante* to conclude that Moore's case would have been harmed if his confession to police had been admitted *if the case had gone to trial* and, therefore, that Moore was prejudiced by his attorney's failure to move to suppress the confession.

None of the opinions cited by Moore uses a process anything like the Ninth Circuit's approach here. For example, in *Ward v. Dretke*, 420 F.3d 479 (5th Cir. 2005), the petitioner failed to prove that his attorney acted unreasonably by not moving to suppress evidence, because the evidence would have been admissible on other grounds. The Fifth Circuit did, as Moore notes, turn to *Wong Sun v. United States*, 371 U.S. 471

(1963), to determine whether the evidence would otherwise have been admissible as "fruit of the poisonous tree." *Id.* at 488. But the court did not—as the Ninth Circuit did here—assess whether admission of the evidence at trial (if the case had gone to trial) would have prejudiced the petitioner.

Gilbert v. Merchant, 488 F.3d 780 (7th Cir. 2007), which Moore discusses most extensively, is similarly unhelpful. In that case, the Illinois Appellate Court had held that the petitioner's confession was voluntary. The Seventh Circuit agreed and, because a motion to suppress the confession would not have succeeded, wrote that the petitioner could not establish prejudice. *Id.* at 795. *See also Id.* at 790-91 (petitioner was required to prove that "had his confession been suppressed, it is reasonably likely that he would have gone to trial rather than plead guilty."). The Seventh Circuit did not attempt to discern the prejudicial impact that the confession might have had *on a trial* if the petitioner had chosen to go to trial, as the Ninth Circuit did here.

In short, in none of the four opinions cited by Moore did the courts use *Fulminante* in the way that the Ninth Circuit did in this case. If, as the Ninth Circuit contends (App. 41), *Fulminante* is the "clearly established" federal law for determining whether a federal habeas petitioner who pleaded guilty or no contest was prejudiced by his

counsel's failure to file a motion to suppress a confession, Moore has not supported that assertion here. The Ninth Circuit stands alone in the analytic process it announced in this case.

C. The procedural issues raised by Moore do not preclude review by this Court.

Moore argues that this Court should deny the superintendent's petition on two procedural grounds, but there is no impediment to review. First, Moore asserts that a footnote in the petition "suggests that the inadmissibility of the statement at issue may be in question." (Brief in Opp. 20). To be clear, the superintendent is not arguing that Moore's confession would have been admissible. Even assuming that a motion to suppress would have succeeded, however, the Ninth Circuit erroneously injected *Fulminante* into the *Strickland* and *Hill* analysis.

Moore also asserts that the superintendent has waived the right to argue that Moore still would have pleaded no contest even if his attorney had filed the motion to suppress, by not making that argument below. (Brief in Opp. 21-22). As discussed above, neither the superintendent's argument in state court, nor the state court's ruling, were as restricted as Moore contends. In any event, the question of whether the Ninth Circuit inappropriately grafted *Fulminante* analysis onto the *Strickland* and *Hill* standards does not turn

on the evidence in this case. Nor is review precluded by the fact that neither party anticipated—in state court or in federal court—that the Ninth Circuit would announce *sua sponte* that *Fulminante* applies in a federal habeas corpus case when a petitioner attempts to overturn a conviction obtained by a plea of guilty or no contest.[5]

Moore's response does not identify any procedural impediment to review of the Ninth Circuit's use of *Fulminante* to analyze whether a petitioner who pleaded guilty or no contest was prejudiced by his attorney's failure to file a motion to suppress.

D. The superintendent's petition does not ask this court to engage in error correction; but if the superintendent is correct, he also is entitled to relief on the merits.

The superintendent agrees with Moore's assertion that a petition for writ of certiorari is "rarely granted" for mere error correction. (Brief in Opp. 22). But the superintendent seeks more than error correction in a single case. The petition seeks reversal of the Ninth Circuit's engrafting of *Arizona v. Fulminante* onto collateral re-

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[5] As noted by Judge Bybee in dissent, neither party suggested to the Ninth Circuit that *Fulminante* had any role to play in this case. App. 85.

views of convictions that were obtained by plea rather than by trial. If the superintendent is correct about the issue presented, he believes he also is entitled to reversal on the merits, and the petition's second question presented explains why that is so. The petition should not be denied simply because it asks for specific relief that follows from the primary reason for seeking the writ of certiorari.

Respectfully submitted,

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Deputy Attorney General
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Jeff Premo,
Superintendent, Oregon
State Penitentiary

January 15, 2010

JOINT APPENDIX

Supreme Court, U.S.
FILED
JUN 24 2010
OFFICE OF THE CLERK

No. 09-658

In the Supreme Court of the United States

JEFF PREMO, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

RANDY JOSEPH MOORE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED November 24, 2009
CERTIORARI GRANTED March 22, 2010

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NOTICE

The following items are not contained in the joint appendix because they appear either in the appendix to the certiorari petition or in the supplemental appendix that accompanied the brief in opposition to the certiorari petition:

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U.S. District Court
District of Oregon (Portland)
CIVIL DOCKET FOR CASE #: 3:01-cv-01795-ST

Moore v. Czerniak
Assigned to: Magistrate Judge Janice M. Stewart
Case in other court: 04-35713
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 12/12/2001
Date Terminated: 03/02/2004
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Date Filed	#	Docket Text
12/12/2001	1	Petition for Writ of Habeas Corpus (2254) – Challenge to Legality of Duration of Confinement (State) – Filing Fee collected. Receipt #: #441280 issued. Filed by pro se Randy Joseph Moore against Stan Czerniak. (Kirk,) (Entered: 12/13/2001)
2/14/2003	26	Answer. Filed by Stan Czerniak. (Related document(s) 1) (Kirk,) (Entered: 02/18/2003)
9/15/2003	38	Memorandum in Support *of Petition for Writ of Habeas Corpus Pursuant to 28 USC 2254.* Filed by Randy Joseph Moore. (Attachments: # 1 Exhibit Petitioner's Exhibit A)(Creel, Barbara) (Entered: 09/15/2003)
12/03/2003	39	Findings & Recommendation to deny

		petition: Signed on 12/03/2003 by Judge Janice M. Stewart. Objections to the Findings and Recommendation due by 12/22/2003. Response to the objection to the F & R due by 1/12/2004. Related document(s) 1) (St,) (Entered: 12/03/2003)
01/15/2004	46	**CIVIL MINUTES:** Record of Order by Judge Janice M. Stewart – Referring Judge Stewart's Findings and Recommendation filed 12/3/20074, doc. #39, to the Honorable Judge Anna J. Brown for consideration. Objections have been filed. (Related document(s) 39) (da,) (Entered: 01/15/2004)
03/02/2004	47	**ORDER:** Signed on 3/2/04 by Judge Anna J. Brown. Adopting Findings and Recommendation 39. (ljl,) (Entered: 03/04/2004)
03/02/2004	48	Judgment. Signed on 3/2/04 by Judge Anna J. Brown. (ljl,) (Entered: 03/04/2004)
03/17/2004	49	Notice of Appeal by Randy Joseph Moore to USCA For The 9th Circuit. No appeal fee received. IFP DENIED 1/3/02. Counsel appointed 1/3/02. (Related Document(s): Judgment 48) (tomg,) (Entered 03/17/2004)

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 04-15713 **Docketed:** 04/15/2004 **Nature of Suit:** 3530 Habeas Corpus **Termed:** 07/28/2009 Moore v. Czerniak **Appeal From:** U.S. District Court for Oregon, Portland **Fee Status:** IFP
Case Type Information: 1) prisoner 2) state 3) habeas corpus
Originating Court Information: **District:** 0979-3 : CV-01-01795-AJB/JMS **Trial Judge:** Anna J. Brown, District Judge **Date Filed:** 12/12/2001 **Date Order/Judgment:** 03/04/2004 **Date NOA Filed:** 03/17/2004
Prior Cases: None **Current Cases:** None
RANDY JOSEPH MOORE Steven T. Wax, Federal Petitioner-Appellant, Public Defender Direct: 503-326-2123 [COR LD NTC Assist Fed Pub Def]

FPDOR – FEDERAL PUBLIC DEFENDER'S OFFICE (PORTLAND) Suite 1700 101 S.W. Main Street Portland, OR 97204 STAN CZERNIAK, Kathleen Cegla, Assistant Attorney General Superintendent of OSP Respondent-Appellee, [COR NTC Dep State Aty Gen] AGOR – OFFICE OF THE OREGON ATTORNEY GENERAL (SALEM) 400 Justice Building 1162 Court Street, NE Salem, OR 97301-4096		
RANDY JOSEPH MOORE Petitioner-Appellant, v. STAN CZERNIAK, Superintendent of OSP, Respondent-Appellee.		
08/18/2004	9	Filed original and 15 copies of Appellant Randy Joseph Moore opening brief (Informal: no) 33 pages and five excerpts record in 1 volume; served on 8/16/04 [04-15713] (BY)
10/25/2004	13	Filed original and 15 copies aple's 20 page brf; served on 10/22/04. [04-

		15713]
11/26/2004	16	Filed original and 15 copies aplt's rpy brf (Informal: no) of 9 pages; served on 11/22/04. [04-15713] (XX)
07/28/2008	31	FILED OPINION (STEPHEN R. REINHARDT, MARSHA S. BERZON and JAY S. BYBEE) REVERSED AND REMANDED. FILED AND ENTERED JUDGMENT. (PH)
09/15/2008	35	Filed original and 50 copies of Appellee Stan Czerniak petition for panel rehearing and petition for rehearing en banc Number of Pages 18 or 4,096 words. Served on 09/12/2008. Deficiency: None. Date circulated to the court: 09/17/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) (RR)
11/17/2008	39	Filed original and 50 copies of Appellant Randy Joseph Moore RESPONSE to Petition For Panel Rehearing with Suggestion For Rehearing En Banc. Number 17 pages or 3,541 words. Served on 11/14/2008. Date circulated to the court: 11/18/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) PLEASE NOTE: THE ATTACHED DOCUMENT IS A DOCUMENT INTERNAL TO THE COURT AND IS NOT ACCESSIBLE ON PACER OR

		ECF. (RR)
07/28/2009	40	FILED ORDER AND OPINION (STEPHEN R. REINHARDT, MARSHA S. BERZON and JAY S. BYBEE) The majority opinion, concurring opinion, and dissenting opinion filed on July 28, 2008, slip op. 9397, and appearing at 534 F.3d 1128 (9th Cir. 2008), are withdrawn. A new majority opinion, concurring opinion, and dissenting opinion are filed contemporaneously with this order. With the filing of the new opinion, Judge Reinhardt and Judge Berzon vote to deny the petitions for rehearing and rehearing en banc. Judge Bybee votes to grant the petitions for rehearing and rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35. Judge Graber was recused. The petitions for rehearing and rehearing en banc are denied. No future petitions for rehearing or rehearing en banc will be entertained. Judge: SR Authoring, Judge: MSB Concurring, Judge: JSB Dissenting. (Dissent to Order by Judges Callahan and Bea) FILED AND ENTERED JUDGMENT.

		[7005872] (RP)
08/03/2009	42	Filed order (STEPEHEN R. REINHARDT, MARSHA S. BERZON and JAY S. BYBEE): Respondent-Appellee's motion for a 90-day stay of the issuance of the mandate pending application for writ of certiorari is granted. FED. R. APP. P 41(d)(2). The mandate is stayed for ninety (90) days pending the Respondent-Appellee's filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed, and if the writ of certiorari is granted by the Supreme Court, the stay shall continue until final disposition by the Supreme Court. [7012637] (AF)
10/22/2009	46	Received letter from Supreme Court dated 10/19/2009. The application for an extension of time within which to file a petition for a writ of certiorari has been presented to Justice Kennedy, who on 10/19/09 extended the time to and including 11/25/09. Application No. 09A358 [7106894] (RR)
12/10/2009	47	Received notice from the Supreme Court: petition for certiorari filed on 11/24/2009 and placed on the docket 12/07/09. Supreme Court Number 09-658. [7163267] (RR)

3/26/2010	48	Received notice from the Supreme Court. The motion of respondent for leave to proceed in forma pauperis is granted. Petition for a writ of certiorari GRANTED on 03/22/2010. Supreme Court Number 09-658. [7280032] (RR)

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JOSEPHINE COUNTY

STATE OF OREGON,	Case No. 96-CR-0118
Plaintiff,	CHARGE(s): Felony Murder
vs.	ORS 163.115
RANDY JOSEPH MOORE,	PETITION TO ENTER PLEA OF NO CONTEST AND ORDER PERMITTING THE SAME
Defendant.	

The above named Defendant represents to the Court as follows:

(1) My true name is RANDY JOSEPH MOORE.

I am 40 years of age; my social Security Number is 542-72-3721.

X I read, write and understand the English language.

__ I do not read, write and understand the English language, however I have had the assistance of a qualified interpreter for this case and plea.

(2) I request all proceedings against me to be had in the name which I have hereby declared to be my true name.

(3) I am represented by counsel and the name of my attorney is Kim L. Jordan.

I have received a copy of the complaint/information/indictment before being called upon to plead and have read the same, discussed it with my attorney and fully understand all charges made against me.

(4) I have told my attorney all the facts and surrounding circumstances as known to me concerning the matters mentioned in the complaint/information/indictment and believe that my attorney is fully informed as to all such matters. My attorney has since informed me and has counseled and advised with me at length as to the nature and cause of each accusation against me as set forth in the complaint/information/indictment and as to any possible defenses I might have in this case.

(5) My attorney has advised me as to the maximum punishment which the law provides for the offense charged in the complaint/information/indictment as follows:

Count 1:$_____ Fine 25 yrs; life parole Months/Years Imprisonment

Count 2: $_____ Fine _____ Months/Years Imprisonment

Count 3: $_____ Fine _____ Months/Years Imprisonment

Count 4: $_____ Fine _____ Months/Years Imprisonment

Additional Counts:_____.

(6) I understand that I am not required to plead guilty or no contest and may plead not guilty if I choose. If I plead not guilty, I understand I am entitled to a speedy trial before a jury of my peers; that I have the right to call witness in my behalf and at no expense to me; and that any such witnesses so called would be compelled to appear and testify; that I have an absolute right to confront any witness that would testify against me and cross examine such witness; that I need not take the witness stand or give any testimony against myself; that the sole burden of proof is upon the State of Oregon to establish my guilt which must be established beyond a reasonable doubt and to a moral certainty; that I have a right to the assistance of a lawyer for my defense at all stages of the proceedings, including a lawyer at State expense if I cannot afford one.

(7) I also understand that prior criminal record could not be used against me except for impeachment purposes; that any admissions, statements or confessions which I may have made or any evidence obtained by virtue of a search and seizure of my property may well be inadmissible against me in evidence unless my constitutional rights have been safeguarded. I understand that if I would like to speak to an attorney concerning my constitutional rights that the Court will grant me time for that purpose.

(8) I declare that no officer or agent of any branch of government nor any lawyer or any other person has made any promise to me, or within my knowledge to anyone else, that I would receive a lighter sentence or any other form of leniency by pleading guilty or no

contest with the exception that: See Addendum to Plea Agreement and I fully understand that I am entitled to no lighter sentence by pleading guilty or no contest than if I stood trial and was convicted. I understand that the Court is not required to accept or comply with any agreement between myself and the District Attorney.

(9) I believe that my attorney has done all that anyone could do to counsel and assist me and that there is nothing about the proceedings in this case against me which I do not fully understand. I am satisfied with the advise and help my attorney has given me.

(10) I know that the Court will not permit anyone who claims to be innocent to plead guilty and with that in mind and because I am guilty and make no claim of innocence, I wish to plead guilty and respectfully request the Court to accept my plea of guilty. Or, if I am pleading no contest, I am saying that I do not contest that the State has evidence of my guilt and wish to have the conviction entered without admitting guilt.

State v. Randy Joseph Moore

ADDENDUM TO PLEA PETITION

Paragraph 8: Defendant will plead no contest to Felony Murder. Defendant understands that "Measure 11" ORS 137.700 and ORS 163.115 provide for a determinate sentence of 300 months for this offense. No reduction or early release is available. However, this plea does not waive any right Defendant may have to except to or appeal from any sentence imposed by the Court.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

RANDY JOSEPH MOORE,

Petitioner,

vs.

MITCH MORROW, ACTING SUPT., Oregon State Penitentiary,

Defendant.

Case No. 98-C15019

TRIAL MEMORANDUM

THE FACTS

Procedural Facts

Petitioner in this Post Conviction matter asks the Court to grant him relief and reverse his conviction and sentence out of a judgment and sentence imposed by the Circuit Court of the State of Oregon for the County of Josephine, Case No. 96-CR0118 on March 20, 1996.

This imprisonment is by virtue of a judgment imposed by the Circuit Court of the State of Oregon for the County of Josephine, No. 96-CR-0118 on March 20, 1996. Petitioner was originally charged by the District Attorney's Information with the crimes of Felony Murder; Kidnapping (Information did not specify degree); and Assault in the Third degree. On March 20, 1993, Petitioner entered a plea of No Contest to the charge of Felony Murder with a Firearm.

On May 1, 1996 the Honorable Gerald C. Neufeld sentenced

[Pages 5 and 6 appear below]

Lonnie Wollhiser and Petitioner, as well as Raymond Moore, requested an attorney more than once and were told they were not officially under arrest (See Pet. Ex. 4, pp. 2-3). Additionally, the detectives promised them they would go to bat for them like they had done for Raymond Moore, if they cooperated (Pet. Ex. 4, p. 4-6). At that point, the detectives stopped the interview and started a new one. At the start of the second interview, the detectives stated that Petitioner and Lonnie were not in custody and that they were promised nothing for their statements (Pet. Ex. 4, p. 1-2 of second interview). The detective did tell Petitioner and Lonnie Woolhiser that he had called the District Attorney and that if they wanted, a lawyer would be appointed for them (Pet. Ex. 4, p. 3 of second interview). After much discussion and promises of leniency Petitioner and Lonnie Woolhiser agreed to give the police a statement. After they completed giving their statements, the detectives reiterated that they would go to the district attorney on behalf of Petitioner and Lonnie Woolhiser (Pet. Ex. 4, p. 76 of second interview).

Claims for Relief

Petitioner's **first claim** for relief is that his imprisonment is and was illegal because he was denied the effective and adequate assistance of trial counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article I,

section 11 of the Constitution of the State of Oregon, and ORS 138.530, because his **trial counsel**:

1. Fail to review Petitioner's statement to the police where investigators continued to question Petitioner despite his request for an attorney.

2. Failed to conduct an adequate and reasonable investigation in to the law and facts of Petitioner's case by not employing an investigator and by failing to file a motion to suppress Petitioner's confession to police.

3. Failed to ensure the Petitioner's plea of "No Contest" was freely, voluntarily, and intelligently made;

4. Failed to properly advise and counsel Petitioner regarding the ramifications of his "No Contest" plea;

5. Failed to object to the use of ORS 137.635 (determinate sentence) on the Judgment Order which clearly did not apply to Petitioner.

6. Failed to advise Petitioner meaning of Post Prison Supervision in Felony Murder conviction.

7. Misadvised Petitioner that he would retain his Fifth Amendment privilege against self incrimination upon a plea of No Contest.

8. By advising Petitioner that if he did not take the plea his brother would also be charged with Felony Murder.

9. By coercing Petitioner into retaining his plea when he wanted to withdraw his No Contest plea.

10. Accepted an involuntary waiver of Petitioner's right to an indictment.

Petitioner's **second claim** for relief is that his imprisonment is and was illegal and these proceedings resulted in a substantial denial of the Petitioner's rights in violation of ORS 138.530 because Petitioner was denied the effective and adequate assistance of appellate counsel under the Sixth and Fourteenth Amendments of the United States Constitution and under

[Pages 21-24 appear below]

(c) When the offense charged is one for which a different or additional penalty is authorized by reason of the fact that the defendant may be adjudged a dangerous offender, that this fact may be established after a plea in the present action, thereby subjecting the defendant to a different or additional penalty.

(d) That if the defendant is not a citizen of the United States, conviction of a crime may result, under the laws of the United States, in deportation, exclusion

from admission to the United States or denial of naturalization.

ORS 135.390 Determining voluntariness of plea. (1) The court shall not accept a plea of guilty or no contest without first determining that the plea is voluntary and intelligently made.

(2) The court shall determine whether the plea is the result of prior plea discussions and a plea agreement. If the plea is the result of a plea agreement, the court shall determine the nature of the agreement.

(3) If the district attorney had agreed to seek charge or sentence concessions which must be approved by the court, the court shall advise the defendant personally that the recommendations of the district attorney are not binding on the court.

ORS 135.395 Determining accuracy of plea. After accepting a plea of guilty or no contest, the court shall not enter a judgment without making such inquiry as may satisfy the court that there is a factual basis for the plea.

Petitioner's trial counsel should have informed and discussed with Petitioner the consequences of his guilty plea. As shown, a criminal defendant's waiver of his constitutional and statutory rights and its accompanying substantive and procedural rights must be freely and voluntarily made. *Lyons v. Pearce*, 298 Or 554 (1985) (guilty pleas must be voluntary and made with knowledge of the consequences); *Brady v. United States*, 397 US 742, 755 (1970) (a guilty plea must stand if defendant is fully aware of the direct consequences, including the actual value of any com-

mitments made to him by the court, prosecutor, or his own counsel); See also, *Boynkin v. Alabama*, 395 US 238 (1969).

In this case, neither the court or Petitioner's attorney fully explained the possible consequences of his guilty plea. Petitioner's trial attorney repeatedly told him that they had no chance of winning and the only way Petitioner could avoid the death penalty was to accept the plea agreement. Petitioner claims his trial attorney had little experience with trying death penalty cases.

Petitioner is prejudiced because he signed the plea agreement without having enough information to do this knowingly and intelligently. As Petitioner was not informed of the direct consequences, his plea is in violation of the Constitution and sate statutes. Petitioner's plea of guilty and waiver of rights was a direct result of his lack of information due to the insufficiency of his trial counsel.

5

Failed to object to the use of ORS 137.635 (determinate sentence) on the Judgment Order which clearly did not apply to Petitioner.

Petitioner asserts his trial counsel was ineffective for failing to object to the application of ORS 137.635 "Denny Smith" to his sentence. ORS 137.635 provides that, when a court sentences a convicted defendant on any of a list of enumerated felonies, and that defendant "has previously been convicted of any of those felonies, the court must impose a determinate sen-

tence that is not subject to reduction or parole. *State v. Weikert,* 145 Or App 263 (1997). Petitioner has not been previously convicted of any of these crimes. In fact, the only prior conviction Petitioner has a 1978 vandalism charge. (Pet. Ex. 2, Motion to Strike and Sentencing Transcript, p. 36). Trial counsel, in his affidavit, admits that he did miss this issue:

> "Frankly, I do not know why the court made reference to 137.635 in the Judgment Order except to make it clear that Mr. Moore was not eligible for any kind of diminishment of sentence under any law whatsoever. If this created some kind of a constitutional issue by virtue of the Court entering what I believe to be empty surplus verbiage on the Sentence Order, then questionably, I did miss it." (Petitioner's Exhibit 2, p.5, lines 1-5)

6

Failed to advise Petitioner meaning of Post Prison Supervision in Felony Murder conviction.

Petitioner would never have taken the plea agreement if would have known that if he violated his PPS after released would be looking at life without possibility of parole. His trial counsel him his PPS would be over after 3 years, didn't tell him that he would have to apply to have the PPS removed after 3 years if kept out of trouble. Would never have taken deal if he had known this.

8

By advising Petitioner that if he did not take the plea his brother would also be charged with Felony Murder.

Petitioner felt pressured to accept the plea agreement because his trial counsel told him the state hadn't ruled out aggravated murder. His brother, Lonnie Woolhiser was offered two, lesser charges.

9

By coercing Petitioner into retaining his plea when he wanted to withdraw his No Contest plea.

Both Petitioner and Lonnie Woolhiser wanted to change their pleas before sentencing but were talked out of it by Lonnie's trial counsel, Claudia Brown, she told them they would only anger the judge who did not have to accept their plea.

10

Accepted an involuntary waiver of Petitioner's right to an indictment.

Petitioner's limited understanding of an indictment came from the dictionary. He had looked the term up before appearing in court. He did not understand the grand jury could return an indictment for lower charges than the DA's information. Just because the District Attorney presented murder didn't

mean Grand Jury shouldn't and couldn't have returned an indictment for a lesser charge.

INTERVIEW WITH RAY MOORE, RANDY MOORE, RONNY WOOLHISER, AND DEBBIE ZIEGLER.
By Det. Sgt. Ron Goodpasture, Det. Dutch Whitehead, and Det. Carroll Huffman
December 20, 1995

RAY - RAY MOORE
RM - RANDY MOORE
RW - RONNY WOOLHISER
DZ - DET. DEBBIE ZIEGLER
DW - DUTCH WHITEHEAD
RG - DET. SGT. RON GOODPASTURE
CH - DET. CARROLL HUFFMAN

RG: Okay, let's start. Today is December 20. I'm Ron Goodpasture, it's 3:10 in the afternoon. This conversation is being tape recorded. In the room is ah Det. Whitehead, Det. Huffman, myself, Ray Moore, Randy Moore, Lonnie Woolhiser, and Debbie Ziegler. Ah, we're here to ah discuss this matter of the murder of Kenneth Rogers, and everybody here is fully aware that the conversation is being tape recorded. Let the record reflect everybody is nodding their head yes. (Laugh) So anyway, ah you guys had some questions for us?

LW: Well yeah we want to know, we just want to know what we are being charge with and...

RG: Well, you haven't been charged with anything yet. When and if we arrest you, then you'll be charged. And we've told you I think that

probably the charge will be ah murder.??? one time??? something close to that.

RAY: Was the other person involved or, or allegedly involved, uh, charged?

RG: I don't know if you guys want to address that issue or not.

DW: Well, it doesn't matter, it doesn't matter, why you, you'll find out, yes, he's charged, he's in jail.

LW: I knew that last night, more or less.

RAY: Yeah, that's what we surmised.

RAY: Yeah, um, I can't really speak for my brothers, but I knew there are things that they would like to discuss, that they're worried their welfare and the manner in which, what they'd like to discuss would reflect on them and that is the purpose that they, they've showed me interest in an attorney, 'cause they're, they're kinda scared.

DW: Oh, I can understand that and as far as.....

CH: _____ understandable.

DW: ...yeah, and as far as what the concerns are for your welfare, okay? We don't know if we can help you until we find out what they are.

RM: Well I think you have a pretty good idea.

DW: What?

RM: I mean as far as the comments you made last night, I think you have a pretty good idea ____? of what really happened ____??

DW: Yeah...

RM: You see....

RM: ....until I, I have to be able to talk to somebody that's on my side, you know, for me, to be able to go tell nobody, ____? I don't trust my judgment right now.

CH: You seem pretty upset, that's understandable.

RAY: 'Cause the individual involved was a friend of his

CH: We uh, we understand that, you know.

RAY: And uh, you know like they, they know that, that there's something that's going to come out of this, okay, something has to. They, you know, people have made beds that have to be slept in, you know.

DW: That's very true.

RAY: And, uh...

DW: Sometimes when people make a bed that they sleep in, it doesn't hurt to take that bed and straighten it up once in a while.

RAY: That's exactly right.

DW: And the only people that can straighten up their own bed are, of course, is the person that just slept in it, they can come back and

straighten their bed up some, and sometimes it makes the bed look better.

RAY: Exactly. I agree completely. You know, um,

CH: Even if you get, really in a lot _____? wait until we can sit down with you and..

KW: You know, we'd just like to talk to somebody, you know

CH: Yeah.

RM: As quick as possible, talk to a lawyer, so

CH: I know.

RM: I believe he's going to say what I want him to????

RAY: If there was some way we could maybe get an attorney in here for a consultation..

DW: Well.

RAY: ...real quickly..

DW: There's, there's only two ways that you're going to be able to....

DW: One is to charge him and you go to arraignments and you get formally charged and if you don't have the money to afford an attorney, which I think you, that's already been discussed, then one will be appointed to represent you.

??: Alright.

DW: Okay. That's it. The other way is, and I think that's already been brought up prior to the re-

cording being turned on, you said that, they wanted too doggone much money and none of you have that kind of money.

RAY: Yeah, and that's their concern, to be honest, is the money. You know, with the attorneys and our concern is having justice served properly.

CH: And,.....???

DW: That's our concern.

CH: _____ is the fact that _____

DW: I think that between these gentlemen here and the other people we've talked to, all we've ever told anybody all we want is the truth.

CH: Yeah, and like I said, you know, like you're aware, you know you think that we know what the story is and stuff and you know, things get out of hand _____?

DW: And as, as you, as you well know, when we talked with you guys, we told you that we would go to bat for you as long as we got the truth.

RM: See that's what I want to hear.

DW: Okay.

??: _____?

DW: And that's understandable, we understand that also, okay?

RAY: I know in my, this is for myself, saying, there was once an officer, and I said hey, look, I want out, I did something and been doing something.

I want out of this, I want a chance. And this officer said, okay, Ray, I'll go to bat for you. And that officer's your captain, laughs.

CH: But he did go to bat for you ____???

RAY: That's exactly right.

DW: You knew what it took...

RAY: I talked to him and he stood behind his word one hundred percent and he's probably one of the best friends I have in the world.

CH: And it's the same with us, we can't go to bat for you, I mean we can't do our best for you until we can sit down and lay up, lay all, lay the cards out, and.

DW: It's be like, it'd be like us getting up to bat in the world series without a bat in our hands.

RAY: Or know what team you're batting against.

CH: So, you know that's, I mean, ___?? we can, decision's got to be made, I guess, I know.

RAY: Decision's here. If you guys want to wait for an attorney, then do it. If, if this guy ???? tells you to wait for an attorney, then do it. Do you think that you can....

RM: I think I can straighten it up by just worrying about getting him hurt, too much.

RAY: Well, you're not going...

LW: That's neither here nor there, I know.

CH: You're not going to hurt _____?? You got to take care of yourself, first, okay, and Lonnie,

Lonnie understands that. Lonnie's got to take care of himself.

DW: You know last night we talked we could see the real closeness, okay, and that is a rare commodity nowadays in this world, lot of people don't have the closeness you guys have got.

CH: Take a man to do what you guys are doing.

DW: I agree with that. The thing is, you said you'd like to straighten this thing out, and you can do so but you don't want to get Lonnie hurt.

RM: Uh-huh.

DW: Okay. Not until we can turn around and take what you're going to say to straighten things out, got to the D.A.'s office, and ask about Lonnie's behalf. The same thing goes with Lonnie, whatever he says, if he doesn't want to get you hurt, he turns around and tells us, we got things that we know that we can corroborate what you're telling us is the truth, we'd go to the D.A. for Lonnie on your behalf. Okay? Carroll and I both told both of you guys that the other night, we would go to bat for you as long as we got the truth.

CH: I mean we can't do that until we know...

RM: Well, should I...

LW: Might as well.

CH: ?????

DW: Hold on a second. You've already, you've already said that you wanted an attorney. Here

and on this tape recorder your changing your mind and you're willing to talk with us.

RM: Yes.

DW: Okay, so that you know you're going to get a fair shake from us alright, I want to verify that with our DA that he is not going and turn around and jam you. I want him to tell me right now on the phone that you can change your mind and he will accept it. So there's no jammin' down the road, okay?

RM: Okay.

DW: So give me a minute and let me go call him.

CH: Get some slips too out your..

DW: Okay.

CH: You okay with this?

??: ????

CH: Hey, we respect you guys for coming in. And you know, we believed you last night. Take a man to admit that he made a mistake.

??: _____??

CH: Hard thing to do. But, once you make that step then life starts over for you.

??: _____??

CH: It does, guarantee you. Your brother there can tell you that.

RG: I really admire what you guys have together, it's really ???

RAY: We're all we got.

RG: I've got a brother, but ???

CH: You don't see that very often.

RAY: We spend years divided. We're coming together little by little.

CH: ??? kind of rough.

RAY: Yeah. They didn't exactly have too good of an older example. (More than one person talking-inaudible).

RAY: He made his own bed. You know, ???

CH: That's exactly right.

RAY: I have a lot of respect for him as well.

RAY: It's awful hard, I even told him I was amazed because I went out to the machine and got the keys to the car. (laugh) Says ??? you had your chance. (laugh)

??: ?????

RAY: You can't run.

CH: Things happen in life.

RAY: We all make choices. We're all held answerable according to the choices we make.

CH: If that's ??? what we need to do, once we start I think is probably talk separately. If ??? decided you know. If ??? do you have any problem with ah..

LW: No I don't.

RG: That would be our choice, but you guys???

RAY: Yeah, 'cause I told them I probably wouldn't be allowed to when it came to that point. ???

CH: I know you guys are probably kind of thirsty.

??: ?????

CH: You guys want another one?

LW: No I won't.

(Laughter)

DZ: I could use the lady's room though. Can you tell me where that is?

RG: Sure.

RAY: ???nieces and nephews. (laugh) I talked to a friend of mine over there who is an attorney, he does mostly injury cases and stuff, you know.

RG: All in Medford?

RAY: Yeah.

RG: Yeah, sometimes they specialize in them to the point where...

RAY: Yeah, boy I was amazed how many of 'em said that Josephine county we don't want. We don't do nothin' over there. (laugh)

RG: Really.

RAY: Yeah. (laugh)

CH: What's that?

RAY: ??? some of the attorneys I talked to over there (laugh)

RG: Well, there's some ??? the travel time and the communication gap would probably be a detriment to the handling of the case and that may be it.

CH: ?????

RAY: 43.

CH: ????

RM: You're 40.

CH: ???

LW: 33

RAY: Well actually I won't be 43 till February. I better quit jumping the gun (laugh).

CH: ??????

RAY: Yes it does. I think it stopped around 39 you know, and I'm not even Jack Benny. (laugh)

CH: hey, once you hit 39 it's a downhill slide.

RAY: It just changes ?????

CH: ????? Are you working now, or just going to school?

RAY: Um going to school; Respiratory Therapy. I'm in my final year. Good Lord.

CH: I thought you worked in a hospital.

RAY: Well, I do. I do ah internship clinic from up there. I love it. It amazes me.

CH: What hospital?

RAY: Up at RVMC mostly. It amazes me how I spent all my life, or my younger days, putting people in there, and I actually enjoy taking them out. (laugh) I really do. I think it is such a kick, and I'm trying to work with geriatrics, and you know I've made my peace with my past my life and with the Lord and everything and ah I don't owe nobody but I sure like doing for the community now you know, especially the older people because things in my life that I did when I was younger have affected the ways things are now in this area and the people who live here. You know and, even though I don't owe them I just feel good about doing something positive.

CH: Putting something back.

RAY: Yeah, exactly you know.

CH: Put some positive back.

Yeah. I tried for the Welfare Services, deliver food to the needy and now I've just been called to be a missionary??? the gospel with Jackson County.

CH: Is that why where you're going to do your missionary work is in Jackson County?

RAY: Yeah, yeah I'm doing it, there's a possibility you know, most of our missionaries are you know 18, 19, 20. And then they go off for two years away from home. And ah I more or less as a stake missionary, I take ??? under my wing and we go do it together, so I'm the local

ward??? members and they're the actual preachers. Although I do the preaching (laugh). I enjoy it, I really do. It's great being able to give back to the community. ??? not always watching over my back.

CH: Somebody come up and pat you on the back ??? on the back.

RAY: Yeah, people actually walk up to me now ??? see me coming. I don't jump. It feels good. I think that's why I when I went back east the DEA wanted me to work with them back there, and I told them no. You know, I just couldn't do it. I needed away from the violence and everything. And it doesn't matter what side of the badge you're on, it's violence.

CH: Oh yeah.

RAY: I've seen enough of it. And it's just getting worse.

CH: ?????

RAY: It's scary. I mean its scares me out there now...

TAPE RAN OUT/TURNED OVER

RM: Smoke in here?

(more than one person talking)

CH: Me too, I quit smoking in '79.

RAY: Did you?

CH: Yeah.

RAY: I've been stopped for nine years. I can sure breath ???

CH: Yeah, it eventually does ???

RAY: I put on weight.

CH: Hey, I thought you were, how come you're not smoking in the ??? again?

LW: ???

CH: I mean I'm so down on it, I even stopped a new pack of cigarettes on the way. (laugh)

??: ?????

RAY: Well that's good.

??: ???

RAY: ??? I came down with chronic bronchitis because of my years of cigarette smoke. And ah a touch of asthma, so.

LW: That because you were smoking them ???

??: That's right. (laugh)

CH: Did you bring more than one tape?

RAY: No, it's a long tape. I use it for class lectures and it's only a 1/3 of the way through and I still have the other side to go. I think I get about 3 hours out of it.

DZ: Got to share.

LW: Huh?

DZ: Got to share.

RAY: I really am proud of you guys.

CH: Hey, so am I. I mean I don't know you guys that well, you know, ??? and the 20 years I've

been with law enforcement ??? been probably been more of a man about it and come forward better than anyone I've seen. Most of the time ???? blame it on somebody else.

RAY: It's always somebody else. That's what we felt.

RM: They look the other way.

CH: It's a might man that ????

RM: ???? figured you would. I figured you would. ??? figured you guys would ???

CH: Oh we don't. We can't you know. Someday you guys may be a victim of a crime and you'll be calling us and say hey ?????? and we'll do the best job we can to help you.

RM: I don't know if I got some time left.

RAY: You do. You do ???

RAY: So you're up there in the Federal Building over there?

CH: Yeah. I've been doing that a little over two years.

RAY: Oh really?

CH: I like it because we're on the, we do like the major stuff you know. We've done ah, since I've been over there we've been involved in most ???????? you know the major big suppliers and stuff like that.

RAY: That's great.

CH: Yeah, and then the big you know pipeline coming up the highway.

RAY: Oh yeah.

CH: It's nothing, to be able to....

??: ?????

CH: ?????

RAY: Boy, I noticed, I don't hardly associate you know outside of my little circle of my church group and school and the hospital. And I see it. I can't believe it.

CH: It's epidemic proportion. There's more out there now than there's ever been.

RAY: Yeah and they're going to pay for it a few years down the line when our young people..

??: ???

RAY: Look at them now. Ah the teenager now man...

??: ????

RAY: Yeah I drive down West McAndrews there, my wife goes to work at 4 in the morning, I see kids out skateboarding at 4 in the morning.

CH: It starts at home, you know, the responsibility. You've got to provide a good home environment, a stable home environment for kids.

RAY: And a good strong support group. That's where I found my ??? coming with the church as a support group.

CH: You bet. It's important.

RAY: My kids they don't even remember my past. You know they kind of remember I was in trouble a lot, but you know.

CH: The world out there is pretty rough and we can't go it alone.

RAY: Yeah.

CH: Talked to Eddie ???? he was concerned about his car, it hadn't gotten back. ??? borrowed his car to go up to the ranch or something.

??: ????

LW: How long ago did you talk to Ed?

CH: When I called up his ???

RAY: Oh so that was, ???? Yeah that was afternoon.

??: ???

RAY: Yeah???

LW: ??? run out of gas ????

CH: We're call, when we get back out there, we'll call.

(Dutch walks back in. Everyone talking.)

RAY: What did you say?

DW: I could go for a glass of water.

DW: What's that? Glass of water? I don't have any glasses down here. Who wants water?

DW: ??? Randy.

DW: There's some in the kitchen. Come on Randy there's a water fountain right down the hall.

CH: There's some glasses in the kitchen.

DW: Are there? Okay.

CH: Time now is 1539 hours. I'm going to turn the tape off. Maybe.

INTERVIEW 12-20-95

CASE 95-12138

DETECTIVE DUTCH WHITEHEAD

DETECTIVE CARROLL HUFFMAN

RANDY MOORE (RM)

RAYMOND MOORE (RayM)

LONNIE WOOLHISER

DEBBIE ZIEGLER

DW This will be another taped interview, um. Conducting the interview will be myself Detective Dutch Whitehead, Josephine County Sheriff's Office and Detective Carroll Huffman, Josephine County Sheriff's Office. Uh, today's date is December the 20th, 1995, the time is 3:41 PM according to my watch. Present in the room is Detective Huffman uh Mr. Raymond Moore, Mr. Randy Moore, Mr. Lonnie Woolhiser and is it Ms, we'll say Ms. Debbie Ziegler. Kay. Now for the sake of the tape recorder um would everybody please say yes to the fact that they understand that his conversation is being recorded

RayM Ray Moore yes

RM Randy Moore yes

LW Lonnie Woolhiser yes

DZ Debbie Ziegler yes

DW Dutch Whitehead yes

CH Detective Hoffman

DW K, everybody is uh aware that this conversation is being recorded. I um what we want to do first is I want to clear the air on a couple of uh things we talked about prior to me leaving the room and contacting the DA or our Deputy DA actually. First off, um Randy you and Lonnie have come to the Sheriff's Office here voluntarily. Is that true or not true?

RM Yes sir, it is true

DW OK. While you're here in the Sheriff's Office are either one of you in custody at this point?

RM No we're not

LW No

DW K. Have either one of you been charged with any type of a crime?

RM No

LW Not at the present (laughter)

RM Not at the present

DW Has anyone promised you anything to give us a statement here today?

RM Not other un helping the best you could

DW And I what I told you there that with a with a statement just like I told everybody else in-

volved in this investigation with a statement that comes truthfully I would go make the recommendations and thats thats for my (unreadable)

RM Yep

DW K

RM Ya

DW So thats what I've promised ya

RM Thats all ya promised me

DW OK. Have we in any way threatened you to come here in the Sheriff's Office today?

LW No

RM No

DW OK. While we were talking earlier a comment was made by you Randy that you were thinking maybe you wanted somebody on yer side K which in essence you wo said I want somebody on my side and maybe I should talk to an attorney, true?

RM Yes

DW K. At this point in time I'll uh p let me rephrase it, about five minutes later you changed your mind and you said that you wanted to go ahead and clear this up and you were about ready to talk to us and I stopped you

RM That's right

DW OK. What I want to do now is to let you know cuz I did make a statement I said something

about well there's only a couple of ways I'm aware of that you can get an attorney, one is to hire one for yourself or be charged formally with a crime and then you get one to appoint you, or to represent you, right?

RM Yes

DW Ok. Humph. I was wrong. If uh when after talking to the DA cuz I told ya I wanted to call him first, didn't want to jam you guys at all right?

RM Um hum

DW I called him and he said if you want an attorney court appointed attorney you can have one at this time, K? But if you want to go ahead and talk with us you can. The main thing is we want everybody on this recording to know that you guys are not in custody, K? And this is not in um in custody interrogation type of thing. K?

RM K

DW And um I want everybody to know that you came in here under your own free will, true?

RM Yes, true

DW You were about to volunteer a statement to us when I stopped you, is that true?

LW True

RM Yes

DW K. Cuz I want everybody to know from this moment on if we go on with this statement that in no way you guys were coerced or anything else and you understand that we do not and will not willfully violate your rights

RM Yes

DW K. You guys got any questions of that at all?

RM No.

LW No, not really

DW OK. Now uh your brother made a comment to you a while back during our first conversation that if in your gut you think you need an attorney, that's what you should do. Shortly after he made that you guys started to give us a statement, true?

RM True

DW So now I guess where we're at is uh where do we go from here.

RM Hum.

RM I guess I need to make a statement

DW K. when you guys make this statement would you rather make the statement with you and your brother here without Lonnie or would you like Lonnie and your brother to stay here, how would you

RM Lonnie and my brother

DW Lonnie and ya, you want all of us to stay here?

RM Yes

DW That's fine. We'll go along with that

LW That's fine

CH How about you Lonnie, you never answered what you decision was?

LW Yea, I'm ready to make a statement

DW K. Now you understand if you make this statement, K, you can stop talking any time you wish, K? And you understand that at any time that you decide you have the right to turn around and leave any time you want to, you're free to go, you're not in custody and you have the right to stop and say at this point I think I want to talk to an attorney and we'll see what we can do about getting you one. Ya all understand that?

RM Yep.

DW OK. Then what we'll do if you still want to do the statement I get started into this K? Um Um, this statement that we're talking about giving an everything else as we were going through this discussion um Sergeant Ron Goodpasture, Josephine County Sheriff's Office, uh also uh entered the room. This case is involving a homicide case uh the date of the homicide was 12-08-1995 and the case number is 95 dash 12138. Uh, as before all parties um in this room have been advised that the conversation is being recorded except for you Sergeant Goodpasture. Do you understand this conversation is being recorded?

RG Yes I do

DW OK. One at a time, Randy I'd like for you to give me your full name

RM Randy Joseph Moore

DW K. What is your current address?

RM: Uh PO Box 64 McCaleb's Ranch, Selma

DW K. Is there a telephone there?

RM No there's not

DW K. What is your age right now?

RM 40

DW And what is your date of birth

RM Seven two Fifty-five

DW K. Lonnie what is your full name?

LW Lonnie Ray Woolhiser

DW K. And you current address?

LW Is uh 291 Raymond Street

DW K. Is there a phone at that address?

LW Yes

DW What's your phone number?

LW Uh five nine two sixty-one thirty, sixty-one forty?

DZ unreadable

LW Forty-three sixty-eight

DW Five nine two forty-three sixty-eight?

LW Right

DW K. And you old are you right now Lonnie?

LW Uh 33

DW K. And what is your date of birth

LW Four twelve sixty-two

DW K. Randy the statement you're about to give us is it a voluntary statement given by yourself?

RM Yes

DW Lonnie, the statement you're about to give us is a voluntary statement by yourself?

LW Yes

DW Randy do you understand, read and write the English language?

RM Yes I do.

DW K. What's the highest level of education you've reached?

RM Eleventh actually

DW Eleventh grade?

RM Yes. I've been in college several times but never finished.

DW Ok. So you've got actually something beyond the eleventh grade?

RM Yea.

DW Lonnie, do you read an write and understand the English language?

LW Yes.

DW What is the highest level education that you have?

LW Tenth.

DW Tenth grade? OK. At this point what I'm gonna do is I'm gonna advise you of your your rights, K? And I'm gonna do this I'll read the question once and then what I'm going to do is get both of you to answer it separately, OK? If you do not understand any of these questions please stop me and ask so I can explain to you. If I don't have the answer by golly I know where to go find it, OK? Randy, Lonnie, do you understand you have the right to remain silent?

RM Yes

? unreadable

DW Anything you say can be used against you in a court of law, do you understand that?

RM yes

LW yes

DW You have the right to talk to an attorney and have him present with you while being questioned, do you understand that?

RM yes

LW yes

DW If you cannot afford to hire a lawyer one will be appointed to represent you before any ques-

tioning if you wish one. Do you understand that?

RM yes

LW yes

DW If you give a statement you can stop talking any time you wish. Do you guys understand that?

RM yes

LW yes

DW Having these rights in mind do you wish to talk to us now in regards to the death investigation of Kenny Rogers?

LW yes

RM yes

DW K. At this time I just read from this form here what I'd like for you guys to do at the end of each one of those questions you'll see a question mark. If you understand that questions put your initials at the end of the questions marks would you please

DW I'm gonna ask for the correct spelling of your last name is WOOLHISER?

LW Right

CH Is that Raymond. I mean

RM Randy, RANDY

RayM unreadable

DW And both of ya understand your constitutional rights and both of you are still willing to continue on and give a statement?

LW Yes

RM yes

DW K. Lonnie are you currently under the influence of drugs or alcohol?

LW No

DW Lonnie are you currently in custody?

LW No

DW Randy are you currently in custody?

RM No

DW Lonnie have you been charged with a crime?

LW No

DW Randy have you been charged with a crime?

RM No

DW K. At this point what I would do is to let you two guys decide where you want to start and then you just go ahead and tell us the story, K? Or whatever statement you want to give. Tell us the story and then if after we hear what you have to say then we'll go back and ask some questions and fill it in from there, K?

RM Lonnie you start from your part

LW Uh we were just uh over at the house and Roy was rantin and ravin about Kenny breaking in to his cabin

CH Do you remember what day that was? (unreadable)

RM Thursday

LW Thursday I suppose yea and uh so we just said well let's go talk to him see if he did ya know. So we started out there and uh we were plannin on scarin him, you know knock the shit out of him and take him up you know an uh make him walk home. When we got out there an and uh as soon as we got in the RV I slapped him around, knocked the shit out of him a few times, uh, I duct taped his hands an we took him in the car down the road and uh that's where he was shot. An we just left from there uh just left the body where it fell uh got in the car and went home

DW OK, then what

RM (unreadable) to the point where when he got shot I had the gun

CH You had the gun

RM I had the gun and it was an accident. I was trying to uh uncock it when he slipped and hit and all I know is he dropped (covered)

LW trying to shove him up the hill

RM And I don't k know where even where I hit him all I know is he dropped on the ground and that's I froze and freaked.

RM I took the gun from Lonnie cuz it didn't want nuttin you know like that to happen and it happened

DW But the gun was cocked at the time it was handed to you?

RM I don't know whether it Lonnie said he didn't know he probably didn't I probably cocked it when I grabbed it from him. I don't know, I just remember my hand was on the hammer an I went no and then he slipped and hit me and the gun went off

DW OK. Do you have a question Carroll?

CH I was just gonna ask uh if you'd if you'd cocked the weapon prior to

LW I don't believe so

CH to uh Randy you don't believe so? (unreadable)

LW I wouldn't I wouldn't of handed somebody a cocked you know already cocked

CH What what kind of weapon was it?

LW It was a twenty-two mag uh revolver

CH A revolver?

LW The one I told you about previously

CH Did it have a hammer on it?

LW Yes

RM Yes

RM It was a single action

DW single action

DW It's got a blue finish on it or a brown finish or what?

LW Uh it's chrome

DW It's chrome? Do we know where it is now?

LW You guys don't

DW I know we don't

laughter

DW Right. Let me rephrase that. Do you know where it is now, I know we don't?

LW I know approximately

DW OK. All right, let me back up here a little bit. This was on Thursday, K, and that has to be Thursday December the seventh

LW Uh

DW Whatever date that was

LW Whatever date

RM Pearl Harbor day

DW Pearl Harbor day, OK, that's December the seventh, all right. Now let me ask you this. You said you were out at the house. Who's house were you at?

LW We were at Debbie's house

DW Over at Debbie's house. K. And who all is at Debbie's house

LW Uh, there was a house full, uh,

RM Bo and Vicky

LW Yea, Bo, Vicky uh

RM Ed

LW Was Ed and Linda there? Er

RM No Linda wasn't there, just Ed

RM and me and Roy and Lonnie

DW OK. Who was it well you said actually that I believe you said that Roy was the one that wanted to go over an talk to him about the break in at the cabin

LW uh huh

CH You said he was rantin and ravin, what what was he saying?

DW Well lets li lets get lets get there first

CH I mean while we were at the house

DW Well no he's talkin was he rantin an ravin at your house er at at Debbie's house or (unreadable)

LW Well

LW unreadable bitchin you know he was just commenting that

DW Roy's bitchin?

LW Yea

DW OK. Go ahead. What's Roy talking about? What's he sayin

LW Uh, about Kenny slashing his tires an an uh breakin into his cabin stole some campin gear (unreadable). But he had no he just wanted to go confront him and ask him about it uh an uh uh and uh we were all pretty sure so we went out there (unreadable) confronted him about it and uh he denied he

DW OK, but when you're at the house and Roy is rantin and ravin and wants to go out there an confront him about breaking in to the cabin (covered by cough) OK, you said earlier too that you had decided you were gonna now correct me if I'm wrong, but you decided you're gonna go over there and you were going to mess him up a little bit

LW Um hum

DW And make him walk up

LW Yea

DW OK. Did you guys decide that before you left Debbie's

LW Well, we kind of talked talked about it on the way you know

DW OK. Did Roy ask you to go with him? Over to Ken's motor home?

LW Yea, he asked if we'd ride along, you know

DW OK. Did he ask you also Randy if you'd ride along or?

RM I'm not sure whether he asked me or not, I just know I rode in the back seat.

DW OK. And in the back seat next to you there was something sitting on the seat. What was it that was sitting on the seat?

RM (unreadable) seat next to me

DW Big pile of laundry maybe?

RM Later yea

DW K. Vicky and Bo's laundry. You guys you guys now get in the car and who's car are you in

LW We're in Bo's

DW In Bo's car. Where was Bo and Vicky at the time?

LW Uh, he was probably passed out, in the house I'm guessing

DW K. And Vicky's still at the house

LW Um hum

RM Yea

DW K. So when you guys are driving from your house there on on the address you gave on Raymond

LW Um hum

DW And drivin over to see Ken at the motorhome, that's when you were talking about and correct me if I'm wrong, K, bu I I don't wanta put words in your mouth

LW Uh

DW but you guys talking about messing him up a little bit, take him off some place and make him walk home

LW Yea, we were gonna scare him

DW OK. And part of scaring him was to take him some place and make him walk home

LW Yep

DW is what I understood you to say earlier

RM Yep

LW Yep. Take him up in the woods and make him walk home

DW OK. You drive down to Hidden Creek Road, you get to Hidden Creek Road, you turn up the road and you head start heading down to the motorhome

LW Uh hum

DW What happened?

LW Uh, we just pulled up and got out of the car an I said hi how's it going you know and there was other people standing around and uh about that time they got in an left in uh truck I think it was, something like that

RM I don't know what (unreadable/covered)

LW Anyway they got in a vehicle and left and uh we asked Kenny if he wanted a drink of beer so uh sat there an drank beer an (unreadable) walked in the door is when I smacked him first time

DW Walked in the door of the motorhome?

LW Uh hum. An uh

DW OK. When you walked in the door and you smack him, where is Roy?

RM He's out by the door

LW Uh right behind me (unreadable)

RM Right behind him

DW And and where are you Randy?

RM I was just getting out of being (unreadable) from that guy and walking around to the trailer

DW OK, so you're coming around to the motorhome, Roy's out by the door, and you're inside and you smacked Ken

LW Um hum

DW Where'd you hit him?

LW In the face

DW K. What else did you do while you were in there?

LW Uh, we duct taped his hands

DW K

LW Roy gave me the duct tape

DW Where is Ken standing when you hit him?

LW Oh he's standing up by the front of the the uh RV, towards the driver's seat

DW Toward's the driver's seat? K. When you hit him did he fall down?

LW Uh um yea he fell back against the doghouse there

DW The dog. Oh that's that little platform that sits up

LW Where the engine's sittin

DW Where the engine's sittin there? OK. Did you hit him again after that or just

LW Yea, I hit him two or three times

DW: K. And when you hit him two or three times where did you hit him?

LW In the face

DW Did you say anything to him while yer yer punching on him?

LW Yea, I told him he was broke into the wrong cabin and leave K uh Roy alone you know uh he's been up there before causing raisin hell an Roy didn't want him up there no more so we just you know when down there to kind of let him know stay stay the hell away

DW K. If you said to him stay the fuck away, you can say that, OK? The tape doesn't care

LW Yea, uh OK

DW OK? Anything else happen while you're in the motorhome after you punched him and you told him all this?

LW Uh no, we just duct taped him and drug him out

CH When you hit him, how, what did you hit him with?

LW My hand

CH Your left or right?

LW Right hand

CH Was your fist doubled up?

LW Uh yea, oh the first time it wasn't, I just back handed him

CH Was you wearin any rings or anything?

LW No

CH Have anything in your hands at the time?

LW Huh uh

DW First time you back handed him the oth you said you may have hit him two or three times.

LW Yea

DW The other times you used a closed fist

LW Right

CH Was he standin up then while you that time you (covered)

LW No he was back against the uh dog house

CH Was he conscious?

LW Yea

DW Now for the for the sake of this conversation the dog house is the cover that goes over the top of the engine of that motor home is that

RM Yes

LW Yea

DW OK, so that's what you refer to as the dog house?

LW Yea, the dog house

DW OK. Did you see any of this at all Randy?

RM UH no, I came in after Roy handed him the duct tape

DW After Roy handed the duct tape?

RM Yea

DW Yea. How did Roy go about getting that duct tape? I mean did he say I'll get it or did you tell him or how did he do that?

LW covered by above - said there was some in the trunk, so, I was just askin if he had anything to tie him up with and he said I got duct tape and I said that'll do

DW And then, what else did Roy say?

LW Um he said he had some in the trunk and he brought it over to me

DW OK. And where was Ken layin when you duct taped him?

LW On the floor. I pulled him off the dog house and put him on his belly on the floor

DW OK. Was he struggling with you?

LW Not much

DW Be but by yourself you're able to control him?

LW Yep

DW And where're his hands at the time?

LW Uh, well they were along his side and I put em behind his back

DW K. And you were able to control him on the floor and be able to hold his hands behind his back

LW Um hum. He didn't resist much I don don't know why but he didn't

DW K. Did anybody help you to duct tape his hands?

LW No

DW Did Roy come back into the motor home with this duct tape?

LW Uh yea, well I don't know if he actually stepped in because there's no steps there, it's just there's a hole you kinda just walk up an you're in it, you know

DW Yea, you kinda step in it about a foot or so

LW Yea

DW And he handed you the duct tape?

LW Yea

DW Are you right handed or left handed?

LW Right handed

DW What hand did you use to wrap the duct tape with?

LW Probably my right. I probably had it holding his hands with my left and duct taping with right

RM No cuz you used after the first time you used both hands cuz it kept you kept bitchin bout it (unreadable)

CH You seen this?

RM No I heard him bitchin

DW You heard him bitchin about it whipping, you mean in the the duct tape roll getting tangled up

LW It kept breakin. Just wrapping around and it'd breaks

DW OK

LW Cheap duct tape

DW OK.

CH Did anybody ever help you hold his hands while you duct taped him?

LW I don't think so no

DW Was anybody standing in the doorway? You you could hear him bitchin

RM Yea an an I came to the doorway and put my hands up beside the door right there

LW And Roy was standing right there

RM And Roy was standing right there then Roy and uh uh sa Lonnie said grab him and Roy and ma me grabbed him, dragged him out and he was standing up and he walked

CH What do you mean by draggin him out?

RM Pulled him out and told him to stand up (unreadable)

CH You dragged him out feet first? Head first? Er by his arms?

LW Um, by his arms so probably head first, drug his feet behind him

DW Drug his feet behind him?

LW Oh yea

DW OK. And then you end up he stand up outside?

LW Yea

LW Yea he stood up once he got outside

DW K. What did you do after you got him stood up outside?

LW We put him in the car and

DW Ok, let lets ta how how did how did you put him in the car and where did you put him in the car?

LW We put him in the trunk

DW Do you remember how you put him in the trunk? I mean, could you tell me, was he laying on his back, on his side, on his stomach and

which way was he facing when he's in the trunk?

LW Uhh, well he was probably on his side, uh, facing ta towards the front of the car

DW Facing towards the front of the car?

LW Yea

DW K, so he's he's looking at the back of the back seat?

LW Yea

DW And he's got his hands duct taped behind him

LW Right

DW Who has control of the car, in other words

LW Roy

RM Roy

DW Roy. K. So Roy obtained the keys and had control of Bo's car?

LW Yea

RM And he unlocked the trunk

DW He unlocked the trunk. K.

RG Which uh which way was his head facing towards the passenger or driver?

LW I don't know be honest with you

RM I'm not sure

DW OK. Who closes the trunk?

LW Not sure about that either

RM (covered) sure

DW OK. But yer all all three of you standing in the area of the trunk?

LW Yea

DW K. So either all three of you or two of you or somebody closes the trunk anyhow

LW Yea

RM Uh huh

DW What seat did you get in in the car?

RM Uh right rear

DW Right rear? OK. So now we have Randy in the right rear, what seat did you get in Lonnie?

LW Uh front passenger

DW K. So that leaves Roy driving it

LW Right

DW the uh car. K

RG Can I ask something Dutch?

DW Sure

RG When you guys putting him in the trunk what kind of a conversation were you having? Was he protesting?

LW Oh, he was I don't know he was saying something uh calling us brother an you know please don't do this and shit you know. As far as he knew uh well he didn't really know what was going on you know but uh I can imagine what

went through his mind. That was the whole idea, was to scare the fuck out of him you know

DW So the idea was to scare the fuck out of him so in your mind what do you think was going through his mind? Wha wha what would be going through your mind at the time that would cause you to think what's going through his mind

LW Oh I'd probably figure that

RM I don't know

LW He was either going to get his ass beat severely er or even killed you know I mean

DW Did you have those kind of thoughts in your own mind? I mean you're thinking this could be what Ken is thinking? Is that what

LW Uh I didn't really think about that

DW OK. I wasn't sure if I understood that's why I wanted to ask ya

LW No

DW All right

LW There was nothing in our thoughts about I mean what what happened was

RM A complete accident

LW That that wasn't what was

LW We had planned

RM None of us wanted it to

DW Was the plan you actually had was to take him in essence tie him up

RM Take him up in the woods

DW Take him up in the woods. Tell him not to screw with family er or Roy's cabin or anything else any more and then leave him and let him walk out

LW Right

DW That was the basic plan

RM Yep

DW OK. You guys now got him in the trunk and you're starting to drive off. K? Do you have some discussion as to where you're gonna go?

LW No not really, we got out on the highway an uh Roy said where're we taking him, you know, what do you want to do and uh I said I don't know, just drive and we were headed towards Grants Pass and uh we came to the Hayes Hill, the old uh turn off there you know, the old highway

DW Um hum

LW and drove down it and uh we were just kind of looking for a place we could get off park the car off we passed up the first little skid road there and we seen another little turn off but we couldn't drive up it so we were just gonna walk him up the hill and

DW OK, so you pulled the car off to the side of the road?

LW Uh hum

DW K. All of you get out of the car?

RM Yes

DW OK. What after you get out of the car what happens?

RM Well Roy unlocks the trunk and Roy and Lonnie pull Kenny up and I give a hand when Kenny's slipper got stuck

DW His slipper got stuck?

RM I think his slipper something he said hold a minute so I reached in and pulled him

DW Something got stuck was hang up in the trunk?

RM Yea

DW While you're trying to get him out? K. When you get him out does he stand on his own two feet?

LW Yep

DW Is he still able to walk?

LW Oh yea

RM Yea

DW Uh, what do you see on his face? You you'd already hit him a few times

LW Oh he was yea he was pretty bloody

DW OK. Did he stumble or fall or anthing like that while after you get him out of the trunk while yer?

LW Just when were trying to get him up the hill

DW Where'd he fall down at?

LW Right there just

RM Right as you start (covered)

LW Ten feet off the road or something I don't know. We were just gonna try and take him up that little old skid trial there that's kind of overgrown

DW Um hum

LW And uh (unreadable) he was staggering and shit you know so we tried to push him up the hill and that's when he fell back

DW OK

RM And landed somehow the gun went off

DW OK

RM My hands were on the trigger

DW Lets go to the gun now. Did you have the gun out in the motorhome at all?

LW Yea, yea I did

DW OK. When you did take the gun out in the motorhome

LW Um hum

DW Where did you have the gun, uh on on you, on your person?

LW Um hum

DW Where?

LW In my coat on the side here

DW The jacket you have on right now?

LW Yea

DW Is that the one you got inside?

LW No, huh uh

DW Do you have a holster?

LW (unreadable) found it - no it was (unreadable) had it (unreadable)

DW OK. You had it tucked up under your armpit

LW Yea

DW K.

CH Where was the gun at when you drove over there? Was it stuck under your arm? Did you have it somewhere in the car?

LW No it was sitting on the floorboard

CH On the floorboard?

DW Uh, in front of your feet?

LW Yea

DW Where was the gun, was the gun at your house?

LW Yep

DW When you left the house did you make any commet to anybody about getting your gun?

LW No huh uh. I just

DW Just went in and got

LW Fact I don't even think they knew I had it when I had it

DW OK

LW When I first got in the car

DW What was the reason for taking the gun over there?

LW To scare him I mean you know, to kind of reinforce in

DW OK. And this gun you said is a twenty-two caliber revolver magnum

LW Right

DW Twenty-two caliber magnum revolver I guess makes better sense. And its chrome in color?

LW Yea

DW How long is the barrel?

LW Oh I don't know it's like that

DW Demonstrating six or six to eight inches

LW Six inches, about six inches, something like that

DW And you laid the gun on the floor board in the car while you drove over there?

LW Um hum

DW In a position to where could Randy have seen it?

LW I don't know, probably not from the back seat

DW Could've Roy have seen it?

LW Yea, Roy Roy knew it was there

DW Roy knew it was there

CH How (unreadable)

LW Well they all knew it was there once we got in the car you know

DW Oh, you took it out and they all knew it was in the car?

LW Well when I got out cause I had it when I left the house I had it underneath my coat to

DW OK

LW And we got in the car I just pulled it out an

DW So you knew the gun was in the car before you even got there Randy?

RM Not before I got there no

DW Now the que the first question that got all this story was did you take the gun out while you were in the motorhome and you said yes

LW Hum uh

DW K. What did you do with the gun. What kind of actions did you go through while you were in the motorhome with Ken using this gun?

LW Uh, well I took it out and I put it in my left hand, that's when I slapped him. Then I got down I just pointed it at him told him he'd fucked up, don't break in you know

DW K

LW (covered) alone, back off, Roy ain't doing your ole lady you know so

DW And you pointed the gun at him?

LW Yea

DW At his belly, his chest, his head, what?

LW His face

DW At his face?

LW Um

DW K. Did you touch him with the gun at all?

LW I don't think so

DW Do you remember whether did you use the gun in any aspect of like for a a pistol whipping or anything?

LW No I never hit him with it

DW Never his him with the gun?

LW No

DW K. Now you drag him out an everything else, you put the gun back up underneath your jacket?

LW Yea, when we were taking him back out

DW K. Na then you've already we've already gone through you put him in the trunk, drove him out there, now you get to this pull off on Old Highway 99, old Hayes Hill Road

LW Right

DW K. You get him out of the trunk, you take the gun out at that point, when you get him out of the trunk?

LW Yea

DW K. What do you do with the gun?

LW Uh, Randy said give it to me

RM He was holding it for a while and I told him give it to me give it to me

DW OK. Where you guys all standing by the trunk of the car when you said that?

RM No, we was over there by the hill

DW OK.

LW We'd started walking him off

DW All right. When you first get Kenny out of the trunk of the car, when you're on Old Highway there, who has the gun?

LW When we first get out of the car?

DW When you first get out of the car

LW I did

DW You did. Then you go back to the trunk of the car, open up the trunk. Who opens the trunk?

RM Roy had the key

DW K. And you still have the gun at this time?

LW Yea, it was (unreadable)

DW K. Now you said Kenny gets out of the trunk and you said he stumbled and fell right there

LW Yea, yea

DW Right close to the car. I think that's what you said

LW Yea

DW Right close to the car, Randy? Randy?

RM He staggered a little bit til he got his on his feet and then he walked and then we started going the hill is when he stumbled

DW Stumbled again?

? (unreadable)

RM An came back against me. And that's when the gun went off.

DW And that's when the gun went off

RM I was just freaked

DW How many shots have you fired through that gun that day? Since the time you left Debbie's house until you left Hayes Hill how many times did that gun get fired?

LW Uh just the once I believe wasn't it?

RM (unreadable) once

RM went off in my hand

RM Went off one time and I just stood there

DW Did you ever shoot that gun close by er aim it you know off to one side or something in trying to scare Ken for for effect if you will? Did you ever discharge that gun more than once?

RM Nope

LW I don't think so

DW OK

RM I would have heard it when he was in the RV if it would've went off

DW So now you're trying to walk you're starting to walk rather from the trunk of the car up into the woods as you start to walk away from the car who has the gun?

LW As we started to walk I did

DW Ok, so you walk a little ways or what? And then you give the gun to Randy?

RM Walk, walk just about to the end of thewhere the gravel was

DW On the curve th, I mean on the road there?

RM Just right right by there

RayM I'm gonna switch my tape

DW OK we'll give you a minute here, go ahead

RayM Thanks

RayM Thank you very much

DW You you bet. Um, what we did there for the sake of this tape recorder is we allowed Raymond Moore to turn his tape over

CH Why did you give Randy the gun?

RM Cuz I told him to

LW He told me to give it to him

RM Give me the gun give me the gun cuz you know I didn't want nothing to go off wrong with the gun you know

DW K. Was Kenny struggling at the time?

RM No

LW Not really

RM He wasn't really struggling. Lonnie had him, was the only one who had him by his ar back arm

LW Trying to push him up the hill there

DW OK

CH You've got the gun, what are you doing with the gun? You're walking him up the hill

RM He handed it to me and I had the gun and

RM I was seeing it was cocked I go no (unreadable) pull the trigger and I had my hand on the hammer and then when he slipped I don't know exactly how where he landed or what, I just know I got bumped and the gun went off an

DW So what, if I hear you correctly, when Lonnie handed you the gun the hammer was cocked back?

RM I might uv when he handed it to me I probably cocked it

DW Oh

RM Out of

DW OK, you may have cocked it yourself

RM I may have cocked it myself

DW Yea, then you realized

RM I don't remember then I realized it was cocked and this is a friend and I'm not gonna shoot em

DW OK

RM And I went

DW And th this is a single action 22

RM Yep

RM Yea

DW So in order to get the hammer to go down you have to pull the trigger and slowly release the hammer, right?

RM Uh hum

RM Yep

DW K. What's the make on this gun?

LW Uh, brand name?

DW The brand name, yea

LW Uh it's something I I don't know, I don't remember what it exactly what the name of it is

DW OK.

LW Just an old piece of shit. 22 mag

DW And how long have you had that

LW Oh, I've had it fer about beginning of spring? Something like that

DW If I remember rightly you had talked to him once before about the gun right?

CH I talked to Lonnie about the gun

DW Yea and what did Lonnie tell you before when you talked to him about the gun?

CH He told me that he purchased it during the summer from uh Ken and that it was either a chrome plated or stainless uh old 22 revolver

DW And that you bought that gun from Ken himself?

LW I tr I traded

CH And then he traded it off to a mushroom dealer in the Brookings area about a month prior to our conversation

DW OK, so you told him you had actually traded that gun off a month ago?

LW Yea, told him I didn't have it any more, got rid of it

DW But in reality you did still have it

LW Yea

DW OK. Um go ahead Carroll

CH When you got the gun from Lonnie, again, why did you get the gun from Lonnie?

RM Cuz I wanted to take it away and make sure you know that he seen the gun but nothing was gonna happen with the gun you know cuz I told him no, no way, an I said that

CH That he seen the gun

RM Yea

CH You mean that Ken seen the gun but

RM Um hum

CH OK. Were you pointing the gun

RM But Lonnie didn't have it and it wasn't a chance cuz we with him one hand the gun in one hand and dragging Kenny other hand

CH OK

LW It was kind of difficult

CH Was you pointing the gun at Ken at that time sos he could see the gun

RM I guess I had to be

CH Um, do you remember

RM I remember holding it up but Kenny was you know Lonnie was here and Kenny was right here when I took it got it from Lonnie I was standing right next to him

DW You were standing right next to Ken?

RM Yes

DW Do you have any

RM (covered) cuz I walked up to Lonnie to get the gun from Lonnie

CH Do you remember how far away from uh Ken you were?

RM Arm distance

CH I mean did you did you have the gun like this

RM Yes, I had the gun up

CH We was your arm extended?

RM (unreadable) extended a little bit, a little bit, yea cause he was right there. Lonnie was here, Lonnie was standing behind Kenny and Kenny was here and I walked up right here

CH So wha, if Ken is uh standing you're standing uh Ken's facing away from you, what side are you on to Ken, what side of Ken are you standing on?

RM Uhhh, this side

CH You're standing on K Ken's left side?

RM Yea

CH K. And where's the gun in relationship to Ken

RM Right in my hand, right here

CH OK. How far away from Ken is the barrel of the gun?

RM It was away from him until uh he bumped into me

CH OK. At the time it was discharged how far away

RM He hit it, so it had to be right there on it

CH Hit it with

RM With his head or his body where ever it went. I didn't stop to look to see

CH How did that ha

RM I knew

CH How did that happen, that he hit it?

RM He ss slipped a little bit on the hill and he was trying to pull him up and he slipped and swung around an came into me. And I had the gun you know ro I was ready I took the gun from Lonnie right here, like this, and when he swung around he hit it and the gun went off as I was releasing the hammer

CH You guys mmm mm mind demonstrating exactly what you remember exact happened, to the best of your knowledge

RM Yea

LW Yea

RayM I'll be Ken

LW Actually kind uh

WM no you're too tall

LW its actually kinda

CH I mean (covered)

RM vague, it's

LW (unreadable) cuz

RM It just happened so fast

RM I just know it just happened its as soon as I got the gun it went off, you know

DW Any idea what Kenny may have slipped on or anything?

LW I don't know, he was't much in, he he couldn't walk half the time any way

DW OK

CH Was you beatin on him at all at this time?

LW No

LW Not at this time no

DW Was it raining or anything to make it slippery

LW It was wet

RM It was wet an moist out, I'm not sure if it was raining, misting maybe or something but it wasn't raining hard

DW OK

RG What time of day do you think it was?

RM Early afternoon

LW Yea, it was early afternoon, I think. Probably somewhere between 11 and 1

DW Eleven and one?

? unreadable

LW I'd say the time is

LW I don't know, but it was like after, cuz we got up uh, got our (unreadable) together I mean it took a few hours an an so it was probably around noon

RG We're curious how you remember it was Thursday

? (unreadable)

LW (unreadable) cuz it was the day before we went down to the ranch

RM And that was also the day I went in town to renew by food stamps

CH In relationship ta as to the day that uh the body was found, when was it?

LW When was the body found? They say it was found Friday

RM They say it was found Friday noon, that was the day before

DW It was the day before?

CH What did you do after the gun went off?

RM I freaked

LW We just

RM I tore my glasses up, threw em out, ripped off my clothes an

LM We just runed around and got in the car and just drove off

CH Did you check Ken?

LW No

RG Did you know where he was hit?

RM No

LW Not for sure

RW I I wa I wasn't sure where he was hit

LW I just knew he dropped like

LW He dropped like

LW A sack of potatoes man, just

DW Where do you think he was hit at?

RM Either in the neck or head

CH In relationship to where the gun was area was pointing er what area of the head to you think that he might have?

RM Or neck

LW Somewhere on the side

LW (covered) upper head somewheres you know

more than one talking

LW Shoulders up put it that way

DW Shoulders up?

LW Yea

RM It was shoulders up

RM Yea

CH On the left side it what you were saying (unreadable)

DW When you guys left from there, you dropped like like you say he dropped like a sack of potatoes, you guys left. When you left from there did you turn around and go up back up the hill or did you go down

LW We went down and then went back up

DW Wen the went down the old highway got on Highway 199 and drove back up?

LW Yea

DW What did you guys talk about on the way back

LW Nothin, there wasn't nothin said

DW Nothing said in the car at all

RM Not other than me throwing my glasses and ripping my coat

CH Where'd you go?

LW We didn't talk about it to nobody, I mean

CH Where'd you go? When you left there, where'd you go

LW Straight home

CH Stop anywhere

LW oh, (unreadable) yea we got rid of the gun

DW Where at?

LW Out in Selma

CH Where?

LW Underneath the bridge

? Where abouts? What bridge?

LW Uh, the bridge that crosses over Deer Creek

RM Deer Creek?

LW On the you go down a little side trail

CH Are we taLking about uh 199 or we...

LW Yea

CH ... talking Deer Creek Road or?

RM 199

LW No 199

CH 199. You talking about the bridge at Lakeshore and 199?

LW Yea

RM Yea

CH Whereabouts down there did you put it?

LW Uh, took it down ta you go down the road and kind of park underneath the bridge and I walked up towards the uh shallower end of the bridge where the bridge meets the uh road

DW Um hum

LW And I just (unreadable) it off in the bushes over there

DW In the briars

LW Um hum

DW How far off do you think you threw it?

LW I don't know, in there a ways

DW I mean did uh did you (covered)

LW (unreadable)

DW Yea, did you (unreadable)

LW I just kinda slung it

DW You didn't rear back like you we for eh like a guy out in center field with a baseball and throw it over to home plate

LW No

DW You didn't throw it that hard huh?

LW No

CH Did you take the uh

LW I just tried to get it in the middle of the briar patch

CH Shells out of the gun before you tossed it?

LW Yea

CH What did you do with those?

LW Chunked em off out on the su road going down the road

CH Remember where?

LW Somewhere between uh Kenny and Selma, I don't know exactly where it was. It was like (unreadable) somewheres

CH What kind of shells did you have in the gun?

LW 22 mag

CH 22 mags. The gun, was it in a holster or anything? When you tossed it?

LW Nu uh. No

DW These 22 mags, do you remember the brand name on em?

LW They're probably CCI. That's the only box I had

DW The only box you had was CCI?

LW I had a box of Win uh Winchesters but I aint seen them in a while I can't find em

RG Were they jacketed rounds or?

RM CCI is jacketed

LW Yea, wasn't a hollow point or nuthin it was the uh solid flat tip uh coated with copper I guess it is

DW K

RG Is the gun still there?

LW Should be

RG (unreadable)

LW Uh hell no (laughter)

CH Could you show us exactly where its at?

LW Yea

CH Would you be willing to show us exactly where its at?

LW Yea. I don't know exactly I know its in that bush somewhere

CH Is it

LW Yea

CH general area where its at

DW Would you be willing to also show us where you think you may have thrown a the ammunition out?

LW Yea

DW Did you throw em all out together?

LW No. Well all the bullets?

DW Yea, all the bullets

LW Well yea well I kinda went through em I just kinda slung em so they're plus we were going down the road

DW OK but I mean you had em all in your hand at one time and threw em?

LW Yea

DW What about the empty casing of the bullet that was fired?

LW Well they were there too

DW That was there to? K. How many bullets do you remember throwing away?

LW Uh should have been six in there

DW Six total

LW Well, plus the empty round

DW Six, well actually five live rounds and one empty round?

LW Uh huh, probably yea

DW K

LW I don't know I've shot that gun before you know and it it mighta had a couple empty rounds in it, (unreadable)

CH Going back to Hayes Hill when you got Ken out of the car, is it possible that when Ken was taken out of the car that he fell down and you may have fired one shot into the ground to try ta scare Ken?

LW I don't remember doin that

RM I don't remember that either

LW Uh huh

DW Is it possible that when Kenny was you were pulling him out of the trunk of the car that you may have ripped his clothes or anything like that?

LW Uhhh, that's possible

RG Randy you said something about his part of his foot getting caught in the trunk or something

RM Yea, something like that, his foot or somethin I remember he said hold it gimme me a minute when they were trying to pull him out and I reached in I can't remember exactly what I was reachin to untangle

DW OK. When you pulled him out of the trunk of the car there at Hayes Hill did he say anything to ya, Kenny? Did Kenny say anything to you guys?

LW No he was just asking what we were doin, why an everything you know

CH What'd you tell him?

LW Told him we were going to teach him a lesson, don't be fuckin with our friend ya know

DW Did he have any comments I mean you're saying you know don't be fucking with our friends and stay away from the cabin cuz you said you told him that in the motorhome, right?

LW Um hum

DW Did he have any comment about whether he broke into the motorho I mean into the cabin or not?

LW Uh he said he didn't do it but he was seen there

DW Did you guys talk to him about the four flat tires on Roy's car?

LW Um hum

DW What'd he say about that?

LW Uh he said he didn't do that either

DW K

CH At any time wh wer wer when this goes down, where's Roy?

RM He's right there

LW He's right there

RM Right there with us

RM When you get out of the car

LW Um hum

RM He comes out an then then he comes over and he's standing with us and then I tell him I tell him you know go look, make sure there ain't nobody coming

CH K. When the shot is fired, where's Roy?

LW Uh he was probably about uh five six feet behind us probably

RM Yep

RM He was not in the car (covered)

LW Where where we parked the car

CH Standing there beside you?

RM Yea he was there

LW Yea

DW He was there? He saw all of that. He wasn't...

LW Oh yea

DW ...he wasn't back at the car while you guys walked off

RM Well he he was right there but he was standin around lookin to make sure no cars was comin

DW OK so

RG So he had his back to you?

RM He might of, you know, cuz I told him there's any cars comin

DW OK

(covered)

CH When the shot was off what does Roy say?

LW Nothin, we all I don't think any of us said anything we just got in the car an drove off and it was pretty pretty quiet on the ride home

CH But he was standing, the three of you guys are together, how how many feet away in your estimation (covered)

LW Well we probably 20 feet from the car (unreadable)

CH OK ho how far away from you was Roy?

LW I don know probably seven eight feet maybe he wasn't far

RM No he wasn't far

CH Did he look at Ken?

LW Uh?

CH After when after he fell, did Roy look at Ken?

LW Uh huh

CH I mean was he right standing right there?

LW Well he was right there I'm sure

RM Yea he helped pull him out of the uh glove box

LW Yea (covered)

RM Oh when you mean after...

RM out of the trunk

RM ....he got shot?

CH got shot

LW Yep

LW Um sure he did I mean

RM I don't know

DW Yea

LW I'm sure he did, he was right there

RM At that point

LW he was freaked out as much as we were

RM I was just holdin the gun...

DW Yea

RM ...an Lonnie comes grabs my hand damn you killed him

DW And then you guys and then you took control of the gun from Randy

LW Yea I took it back from Randy

DW OK

CH You said you tore your glasses up or something

RM Yea

RM twisted em and threw em on the front seat an

LW broke lens popped out

CH You didn't

RG I gotta run

DW OK

CH You didn't you didn't throw anything out...

RG You want another tape?

CH ...away right there?

LW No, no I don't think so uh huh

DW K. Um

RM Not that I'm aware we hadn't thrown (unreadable) just got in the car (covered by door closing) bothered to make sure there were no fingerprints or nothin, just just

LW Just freaked it just freaked us out I mean

? (covered)

LW it was

RM I just killed em you know and then then I started (unreadable) shit they aint gonna believe it was an accident not with him being duct taped

CH?? What was your im, did you when you got out of the car did you intent to kill Ken?

RM No I did not, not at all

CH What what was your intention?

RM Ta make sure uh nothin happened an that he knew that hey don't come back up Store Gulch an I'm in agreeance with ya cause your comin up breakin in slashing tires we don't you (covered)

LW Stay the hell away, you know

CH How, how did you feel after the gun went off?

LW Oh shit

RM Well I aint slept

RM I wanted to get drunk

CH I I want to know how you felt. I mean

RM For a while I didn't feel nothin

CH I mean was you sorry what happened? Did you come (covered)

LW Hell yea

RM Oh yea, I was sorry, that's why I ripped my glassed off an threw em and started rippin my coat and cussing and screaming in the car

CH What was Ken's relationship to you?

RM He was a good friend

CH How long have you know him?

LW Since (unreadable) up

RM Since he's come up. Since I've been here. A little over a year. And I liked Ken

LW Same time. We met him the same day

CH Have you socialized with Ken in the past?

LW Oh yea

RM Yes

LW Po used to party with him an have barbeques an

RM He was at our family reunion an everything

RayM Twenty-first family reunion

RM Yea I mean he was a friend

RayM And he was all right (rest covered)

LW Just somebody that...

RayM got to drinkin

LW ...you know he was messin up an

RayM ...he was a loudmouth, uh

DW One one at a time cuz it gets hard for them to figure this out

RayM He was a loud mouth I that's why I was so so blown away when the truth came to me

CH I just wa

RayM Cuz they were good friends

DW And what you're saying there Raymond is is that you had met Ken in the past...

RayM Yes

DW ...yourself

RayM yes

DW ...an everything else

RayM Um hum

RayM Yes see and we had talked and he'd gotton into an incident in Texas where he had been shot four times, that's why he came up here. My little brother Ritchie let him stay at his place in the RV for all the summer almost a year and then that's how I first met im and that's why like I said

RayM I met him

RayM I knew that he's spent a couple months living out with Randy up at uh McCaleb's Ranch, they got along fine, they'd come up every cou-

ple of weeks and get Randy drunk which would make me mad (laughter), but you know that's why the whole thing when I found out which was just today you know it it just blew me away because of their friendship

RayM So

DW Wh when they talked to you earlier today K they told you this whole story they're telling us now?

RayM Yes sir, they did

CH Debbie, since you're here and you've listened to their story, when did you first find out about this?

DZ Today

CH Today is the first time that you've heard the uh full story as to what happened what had happened?

RM Had to go let the family know first

DW K

LW I wanted to come back do it last night and talk to you know wanted

CH Back to the car

LW ss tell everybody

CH: Was there any blood in the trunk of your car?

RM I don't know

CH At any time di d you discuss what with Bo what happened inside of his car?

RM Somethin bad and he didn't really want to need to know but, I think he put two and two together

LW He knew something (unreadable)

DW Is that what you told Bo that something bad had happened?

RM I said something happened and he don't need to know, just needed to clean his car

DW K

CH And how, what to clean his car did you guys clean his car?

RM Yea

RM We washed it

DW Who all washed it?

RM I did the first time an I an I couldn't get it clean enough so Roy took it to town to wash it

CH What did you do, did you take anything out of the trunk of the car?

RM At that time no I didn't

CH At any time did you take anything out of the trunk of the car in an attempt to clean it?

RM Oh the spare tires and jack and the plug on the bottom

CH How about the carpeting in the trunk

RM It was already out of there

CH It was already gone? How about any

DW What what were you cleaning out of the trunk?

RM Just makin sure there was no blood or nothing

DW Cou did you see any blood when you was trying to wash it up or anything?

RM Umm

LW There was a little on the bumper I think

RM Bumper

DW OK

CH Wud your clothing?

LW Actually I'd rather have a (unreadable)

? Getting ready

RM Uh, Friday, Sunday I burned it

DW Where at?

RM At the ranch

DW What did you burn?

RM Ma all my clothes

DW The clothes you were wearing that day

RM Um hum

DW Did you have blood on those clothes?

RM On the sleeve of my shirt I did

DW K

CH How about you Lonnie?

LW Yep, same, I burnt mine too

LW Just my pants

RM I don't remember

DW OK.

RM I remember that we stopped for a minute an said something about where we were going, where it was at cuz I thought he was at the other place

LW Yea I did too when he turned off I thought he was going the wrong way

DW OK. When you guys got to the motorhome and you met these other people that were there, K and you talked with them and I and I when I talked to you before Randy you said

RM That on jammed me

DW One jammed ya

RM Yep, got in my face and stood there staring at me for a few minutes

DW Right and you said something about a young kid about 14 walked up

RM And handed I uh some kid handed raw Kenny a knife and uh Roy took it away, that's what Roy said

DW OK. Did you see that? Did you see that happen?

RM No, I did not see that actually happen

DW OK but Roy told you about that?

RM Yea

CH When you could see the vehicles that are down there. Roy stop the car the at that time and get out for any reason?

LW I don't think so. Not that I know of

DW Did anybody do anything to try to conceal the license plate number on the car?

LW I don't know if he did or not

LW I didn't

RM I didn't

LW I didn't think about that

RM I didn't think about that at all

DW K. And you don't recall Roy getting out of the car, stopping, getting out of the car before you got to the motorhome? You got another phone call?

CH Got to make a phone call

LW I don't know, I don't know if he did or not, I don't really remember

RM I I think we did stop right when we turned in

DW When you turned in where?

RM Offa the road

DW Off the main highway, onto Hidden Creek Road

RM We did stop for a minute but

DW Did Roy get out? Or did you get out or did Lonnie get out?

doesn't. Um lets go back a little bit to this uh masking tape er uh duct tape. Where did that duct tape come from? Did either one of you guys know?

LW Uh Roy got it

RM Roy got it out of his car

LW ...I guess it was in the car

DW K. Did either one of you recall seeing duct tape in the car while you were in in Bo's car

LW Not really

RM No

LW I just asked him if he had anything to tie him up with and he said he had some duct tape

CH Do you remember anything when you guys turned off the main highway onto Hidden Creek Road do you remember stop the car being stopped and Roy getting out for any reason?

LW Noo, not that I remember

RM Not that I know of

LW Not that I recall. Once we left there, got in the car we just left

RM We left there

CH Wh when you arrived just before you arrived at Ken's house, while you were on the uh gravel road approaching Ken's uh motorhome

LW No

RM I wanted

LW ...days

RM I wanted I wanted

LW ...he stayed in bed and

RM Iwanted tell somebody right then and there but

DW OK, lets uh lets stop

RM scared

DW lets stop the conversation here for a minute until we can turn these tape recorders off um so I can change this tape around here

start of second half of tape

DW OK, the tape recorder has been turned on, uh, there was a break of approximately six to eight minutes for uh rest room purposes, drink of water, and so forth. Um, Randy what I want to ask you is during the period of time that the tape recorder was off did he have any discussion about this case at all?

RM No

DW Lonnie did I have any discussion or anyone have any discussion with you about this case while the tape recorders were off?

LW No

DW K. Um

RM I guess you don't want to smell that either

DW I don't know if Carroll will ever work another case with me or not because I smoke and he

LW Yea pair of pants I had a little bit of blood on em

DW OK. Did you where did you burn those outside or inside?

LW In the stove

DW In the woodstove

LW Um hum

CH Who else have you discussed this with? Who who else did you tell this

? (unreadable)

CH Have you discussed it with Vicky?

LW No

RM I mighta said something she picked up on Thursday night but uh I I didn't outright tell nobody nothin

CH How about, have you discussed it with Eddie

RM No

DW You got one? OK

RM I haven't that's what I aint outright talked to nobody til Ray

CH Lonnie?

LW Yea, same I haven't said anything to anybody (unreadable)

RM They probably picked up cuz I was very upset and

LW And for two...

CH Where'd you burn those at?

LW Uh at the house

CH How about Roy?

LW Yea he burned his at his cabin

RM Uh

DW Whe did you

RM burned his at his cabin or not I think about...

DW when you wh

RM ...at my ranch I don't remember him going to his house after that

RM After that?

? Yea

DW Did you build a fire outside or what?

RM Nope we used the wood stove an an yea I did use one of my boots in that one in the burn barrel

DW Your boots, you burned your boots too?

RM Um hum

DW Why did you burn your boots?

RM Cuz they were involved

DW OK. An then Roy you said burned his clothes also?

RM I guess so

DW K. And you burned your clothes Lonnie at your house?

DW Cuz I remember once before you told me that that Ken had a knife and I just wanted to know if I could clarify that a little bit. Um, when you guys got to the motorhome, do you remember the dogs being there?

RM Yes

DW K. What dogs do you remember being there at the motorhome?

LW Um there was several dogs there, uh Louie was chained up

RM Louie was there

RM He was chained up to the back by his pickup

LW And there were several....

RM And Rowdy

LW ...others running around

RM I know Rowdy, uh I don't know his new puppy he had I never seen it

DW OK. For the sake of th of the tape recorder, um Louie is a big black Rotweiller

RM Rotweiller

RM Uh yes

DW OK. Rowdy is a little brown cocker spaniel?

RM Cocker spaniel yea

DW K. And did you guys see a puppy around anywhere?

LW I do like I said there were several dogs

RM There were several other dogs there but those two I knew

DW Those two you knew?

RM Yea

DW K. Did anybody to anything with Louie, the big Rotweiller?

RM Um no

DW Anybody turn him loose?

RM No he was there (unreadable) still chained up when we left

DW OK. What about Rowdy the little brown cocker spaniel?

RM He was running loose

DW He was running loose? K. And did anybody do anything to Rowdy

LW No I don't think so

DW K.

RM I know I didn't (covered/unreadable) anybody else do any

LW No

DW K. And you guys burned your clothes, burned your boots and everything else and that was just to get rid of uh

LW The blood

DW ...the blood that you had on your clothes and stuff. OK. When you burned Lonnie I'm gonna

ask you first, when you burned your clothes at the house was there anybody at the house at the time you did that?

LW Yea, there was several people in there but they didn't know what I was doing

DW Did they sa

LW I just went in there and I had stocking the stove you know and uh I'd taken the pants off and taken back and just threw em on a chair there so when I was stocking the stove I just chunked em in

DW Did anybody see you put these pants in you think?

LW I don't think so

DW And how about you Ray when uh not Ray I'm sorry Randy uh when you were at the ranch

RM I made sure there was people there but I made sure when I did it nobody was in sight of the stove

DW So nobody was in sight of the stove so

RM When I did it

DW They wouldn't been able to see you

RM And I did it one at a time, you know I put my pants burned them first and then then my socks

DW OK. What about your er you said your boots outside in the burn barrel?

RM Outside in the burn barrel with my jacket

DW OK. Anybody see ya do that?

RM Not that I'm aware of. If they did I didn't no see them see me

DW OK. And when you did this at the ranch, who all was at the ranch?

RM Everybody

CH Who is everybody?

DW Yea, who is everybody?

RM Bo, Vicky, uh Lonnie, Debbie

DW Did you burn

RM Brenda

DW OK, did you burn these the weekend that all of you got together for your barbeque?

RM Yep

DW OK. So I know who all is there

RM Yea. I bu I burned em there and I made sure not not even Debbie or Lonnie seen me do it

DW OK

RM Uh I waited til I got an opportunity when nobody was right around and ran out and did it

DW Di ea how do you two guys know that Roy burned his clothes?

RM He told us

LW He told us. He went he went home and started wipe cleaning up the whole house I mean at Store Gulch

RM Oh yea that's right he did go down there

LW He he wiped everything down and uh burned his clothes and uh he was there for uh several hours and then Ed came back and picked him up and uh took him down to the ranch

DW OK. So while he was there that's when he did all of that and then then he tells you when he gets back to the ranch he did that

LW Uh

RM Yea

DW Did you guys tell him that you burned your clothes?

RM Uh I think I mentioned something to it

DW OK

RM Probably uh probably cause we (unreadable) a couple times an spoke just the three of us away from everybody else

DW OK. How did you guys come to the agreement that all three of you were gonna burn your clothes? Was that discussed by you guys?

LW Not really, I just did it, you know, cuz I knew I had blood on it

RM Yea and I knew what happened

DW K

RM Scared to death

DW Did either one of you two guys have a discussion with Roy about burning clothes to get rid of the evidence?

RM I told him once he better get rid of all his (unreadable)

LW Yea, that's what you know its like

Both speaking at once

LW knew we had to get rid of it you know

DW OK. Um when you're in the motorhome em Lonnie when you and Ken are in the motorhome Roy and Randy are outside

LW Yea

DW K did you see any of these guys I mean were they in a position where you could see them Roy and Randy?

LW Oh yea they were outside the door there

DW OK so you

LW and that door doesn't close so I mean it's wide open

DW Right, there's fact there is no door on it really

? (unreadable)

DW Kenny tore the daw the door off a while back. When you were telling Ken about you know don't fuck with my family stay away from the cabin you guys have had enough of this you know with the break in and the tires and all that and you discussed all that with him while you're hittin him right?

LW Yea

DW Did Kenny say anything back to you?

LW I'm sure I he did yea I couldn't tell ya what it was though its its I wasn't really listening to him you know what I mean it was I don't know I know he said he didn't do it

DW Did you give him any any indication whether you believed that statement I mean he says I didn't do it, did you give him any indication that you believed him or not?

LW No I told him he was full of shit

DW OK. Did you hear any of that conversation Randy?

RM Not word for word I heard a little bit here and there you know

DW And then what you did hear what did you think? From what you remember hearing

RM I thought Kenny was getting hit

DW OK

RM Cuz that's basically what I heard is yea the trailer rocking and the noise in there

DW After you aa like both of your said before you kind of drug him out where his feet were kind of dragging to get him out of the motorhome and then he finally stood up you walked him over to the car Roy unlocks the trunk

LW Um hum

DW K. If I don't say this right correct me um when you went to put him into the trunk I understood that you two guys put him into the trunk

LW Uh we were all three

RM All three

DW All three of you

LW Kenny is a pretty heavy guy I mean you know

DW That's true, yea

RM An all three of us pu uh helped put put him in the trunk

LW In the trunk

RM And we grabbed out the laundry out of the trunk

DW OK. You took the laundry out of the trunk

LW No that's where the

WM Maybe that's where that

LW clothes came from

DW AAAK, that's how the laundry got in the back seat that I made..

RM Yes

DW ...mention of earlier. OK. Did you take the laundry out of the trunk before you put Kenny in there, I mean before you arrived at Kenny's motorhome?

LW Yep

RM Yea

DW So you had to open the trunk

RM I think Roy's the one that took it out of the trunk

RM And I took out the toolbox

LW Put in on the seat

RM toolbox down beside the car for a minute

DW OK

RM And Roy grabbed the laundry then we put em in the back seat

DW OK. And then you went ahead and put Ken in there. When you were putting Kenny in the trunk, did Kenny say anything to you guys at that time? Ask you what was happening? What was going on, why, where're we goin, anything at all?

RM He might uv, I don't remember

LW I don't either

DW OK. And then stop and think, what did he say to you after you stopped on Hayes Hill, the old highway there? When you got him out of the trunk

LW Well he was just asking like what's going on, what are you guys doing you know

DW Did you guys again say anything to him like you did in the motorhome about breaking into the cabin, doing the tires, or anything like that? Do you recall?

RM I've never (unreadable) spoke to him

DW OK

RM You know other'n tell him I said no

LW I say we were just trying to scare him you know put the (covered)

both speaking at once

LW tell you exactly what was said

RM he might've slipped or he mighta turned ya know, saying oh God great you know, he was my friend

DM Yeah

RM And that's the last think in the world I ever wanted ta happen

DW K. Then as you said before you had the gun, you were ready to lower the hammer

RM Eh yea I was ready ta take it off and I told him no

DW Right, to uncock the gun

RM To uncock the gun and go and leave him and go

DW And about the same time uncocked the gun let Kenny go and you guys were gonna leave and just let hm let him stay there right?

RM Yea

RM And walk off

DW Walk off

RM You know he was only a couple miles from the trailer

DW OK. And about that time is when he slipped an

RM An

DW the gun went off

RM Yea, I got bumped and the gun went off

DW OK

RM I'm not sure I I was holdin like this

DW Now you got your hand in front of your chest

RM In front of my chest

DW Um hum

RM I just took it from Lonnie like this had it in front of my chest like this

DW OK

RM And he was standing right here

DW He was standing directly in front of you?

RM Yea, right beside me

DW OK

RM I was up in front of him but he was facing me on the side

DW OK

RM Looking back, kinda towards the road

DW OK

RM And all of a sudden uh the next think I know is I'm being pushed back and the guns gone off and

DW Demonstrating the gun like you were doing with your hand there, with your thumb up and one your index finger out, OK

RM Um hum

DW are you able to stop and think what part of the actual gun Kenny may have hit with his with his body? I mean could you tell whether he hit the top of the gun, your hand

RM It ha it had to be the barrel

DW It had to be the barrel?

RM It had to be the barrel cuz he dropped instantly

DW OK

RM You know it was right there that just that fast

DW OK

RayM Tape has stopped on this cassette player

DW OK. I'll put mine (unreadable)

RayM I'll put pause on mine

DW OK. I'll I'm gonna stop the tape here for a second so I can change the one of our tapes here. Uh the time according to the clock on the wall is four minutes to five PM and date is still the same

DW The tape recorders have been turned back on um the time is about three minutes to five PM uh during the period of time that the uh tape recorders were off was there any discussion about this case

RM No sir

LW? No

DW K. All right, uhm, we covered the reasons why you left the house because Roy was going off about Ken breaking into the cabin and flattening his tires. K. How did Roy know or how did Roy come to the conclusion if you guys have this knowledge, how did he know or how did he come to the conclusion that it was Ken that broke into the cabin and flattened his tires

LW? I don't know cuz he wasn't even around at the time it was supposed to have happened.

RM From what he told me afterwards was he knew for a fact it was Kenny because he had Kenny's Harley knife and if it and he left it there it fit right in th slots on the tires

DW He had what kind of knife?

RM Eah Kenny's Harley knife

DW Kenny's Harley knife?

RM He found Kenny's Harley knife there

DW Oh so Roy tells you that he finds Ken's Harley knife

RM Um hum

DW there at the cabin?

RM Yep. That was after all this

DZ I do know that Kenny had threatened Roy before (unreadable) slashing his tires or doing damage to his car

CH You've heard?

DZ Yes I heard Kenny say so

DW You heard him say so?

DZ I heard him say so

DW OK

DZ It was on another occasion

DW OK. All right. And then Roy told you he took that knife uh Randy and matched it up to the holes in the tire and it matched and

RM It matched

DW K. Did Roy believe that Ken also broke into the cabin and stole a bunch of property that belonged to Roy and uh Bo? Did Roy believe that also?

RM I believe he did cause he searched his property (unreadable) where if Kenny has stashed it anywhere

DW K

RM I believe he believed that

DW OK. So that's what he was going off about when they were oh all of you guys were over at the house there on on a Raymond Street uh Lonnie where you and Debbie are living right?

LW Right

DW And that's when you guys decided to go over there from that point and like you say scare the hell out of him

LW Yea

DW OK. Go ahead

CH: While I was gone did you cover with him any more detail about maybe Roy's stopping and getting out of the car or (unreadable)

DW Yes. Yes and they don't recall him ever getting out of the of the car er they don't recall any uh anyone attempting to uh alter the plates on the car or or anything of that nature. The only time they recall was when they first moved, now correct me if I'm if I don't say it right, K, you guys were there, but they recall when they turned off the highway onto Hidden Creek they stopped for a moment but they don't recall anybody getting out

RM I can't remember whether he did or didn't

RM I don't see why they'd try to hide license plate cause they already knew me

RM Everybody there knew me

RM You know or knew of me

DW Um hum and everybody at the motorhome around they did they know you Lonnie?

LW Kenny's probably the only one there that knew me

DW Kenny was probably the only one that knew you?

LW Well, Linda she we've seen each other

DW OK

LW Well actually we was over at the house once (unreadable)

DW OK

LW But we don't associate

CH The dogs, the Rotweiller

DW We talked about that. Yea, they were all there and everybody was fine and they were left there the Rotweiller was was tied up when you left?

LW Yea

RW Yea he was chained up on his chain

DW OK

CH Did anybody taken any money from Ken?

RM No

DW Yea. Now that was the next thing I was gonna get cuz you guys knew

RM We didn't rob, we didn't have no money afterwards

RM No money

DW Ok. Cuz th you know it was known that uh Craig had given him some money and some food stamps

RM Yea but he was probably broke by then

DZ Oh yea probably out of it by then

DW Well, that's true but we don't know that or not be so he had to ask to find out, cuz that's a question

DZ Knowing Ken an how

DW Right. Did anybody ever use their ATM card? The one that Kenny and ??? would use or anything else you know the bank would

several voices at once

DW OK. None of you guys ever used it?

LW No

RM Uh huh

DW When you left the motorhome other than taking Ken away from the motorhome, K, did you take anything else?

LW No

RM No

DW K

RM No cuz I said we just plannin to scare him and let him go

DW K

RM And hopefully he wouldn't come back up and mess around Store Gulch and that anymore

DW And that would be the end of everything

RM And that'd be the end of it

CH (unreadable)

DW That's what you figured, that's what your plan was. Randy you said earlier you made an attempt to clean the trunk

RM Yea

DW K. And you said there was no carpeting or anything else in the trunk

RM Yea

DW K

RM At that time there was none there was just a tire and a jack and all that that I had to pull out

DW MK, and from what I understood earlier you didn't see any blood in the trunk

RM No I didn't notice any blood but I wasn't takin no chances

DW OK, so you just went ahead and cleaned it. What'd you clean it with?

RM Water and clorox

DW OK. Lonnie you said that you thought you saw some blood on the bumper

LW Um hum

DW ... of the, K. Randy makes the attempt to clean the trunk

RM I cleaned the bumper too

DW And you cleaned the bumper also

RM Yes

LW Washed the whole car

RM whole car

DW Oh you washed the car out

RM Yea

DW the car outside also?

LW He did, I didn't

RM I did, I washed every place I could

DW OK

RM ... spot or anything that looked like it might be blood

DW OK. So you washed the whole car outside and the trunk area?

? Um hum

DW Did you take any part in cleaning the car?

? (unreadable)

DW And then you said Roy cleaned the

RM Well I told him I couldn't get all cleaned good enough, didn't have enough water pressure

DW OK, so what did what did Roy do to help clean the car?

RM He took it into town

LW (unreadable) spray wash er a high pressure

LW High pressure wash

DW OK. Did he say where he did that

RM No

LW No

DW He just said he took into town and did that?

? Yea

DW I think uh Detective Huffman's already asked this but I want to ask one more time and I think I'm just about at the end of this. You guys said before you didn't say anything at all to anyone. K. Do you guys have any knowledge whether Roy said anything to anyone?

LW To you guys evidently (laughter)

RM Not to my knowledge but I have a feeling he probably did

LW Yea, I think he was flappin his lips

DW Did anybody approach you two guys and ask you any questions about all this?

RM Well a few people have been asking what was going on cuz all our friends

LW (unreadable) curious about you know Kenny

RM knew something was up

LW They just wanted to know what was going on

RM They knew something was up in spite of our secret talks an the way I was acting for two days, I just locked myself in the room, basically even when they were up barbequeing I stayed in the room

DW K. You said secret talks, what kind what do you mean by that

RM Oh we'd walk by ourselves the three of us and

LW walk down to the river or something

RM and talk

DZ By the way its not totally unusual for them, they have their little secret talks when they want to go on beer runs and (covered by laughter)

DZ So them going off on their own is not something out of the norm

DW OK

DZ OK

CH Do you know where Bo and Vicky went?

RM No

DZ No

RM No I have no idea

DZ No

LW They just said they were gettin cuz

RM He he pretty well guessed what's went on and he didn't want to be here for no questions or nothing

RM He said he was wanted

DZ I just figured they they were

RM I understand that you know cuz he was (unreadable/covered)

DZ (unreadable) hadn't known em long. I didn't think anything of it

DW We understand that while everyone is down at the ranch for the barbeque there was a beer run made Saturday night and then I believe it was Ed and Roy that made the beer run and when they came back they brought a newspaper with them because the lady at the store had said that you know that uh it was in the paper about Ken

LW Uh hum

DW K? When that newspaper was brought back to the ranch and that article was read and everybody knew that Ken's body'd been found, was there any discussion about it at all

LW Well everybody we just kind of you know played it (unreadable)

? Yep

LW We didn't know nothin about it

LW We didn't even know nothing about it and

LW it was a shame and all that kind of stuff you know an

DW OK

RM Didn't want to get anybody else in trouble, you know, enough people

DZ I didn't know until we'd read the paper and I still didn't know the actual thing

RM Yea but everybody's basically guessing but nobody ever got (unreadable/covered) by it

DZ (at same time as above line) everybody was just talking about how he and Kenny and reminiscing and we you know

RM Loose lips sink ships

DZ how could it you know

RM I was scared (unreadable) hoping like I said I was hoping you'd look the other way but I I knew he (unreadable/covered) but I wasn't going to run

DZ (same time as above line) how could it happen (unreadable) cuz he hitchhiked all the time, he drank all the time

DW That was the general conversation then?

DZ Yea nothing you know

DW OK. You got anything else Carroll?

CH No. Do you have anything you wanta say Lonnie?

LW Uh, other than the fact that it was an accident man, it wasn't it wasn't planned it was

CH How do you feel about what happened?

LW Feel like shit

CH Randy, you want anything you want to say

RM It will never be the same

CH Lonnie was just getting into a nice relationship with a lady

DW OK. I um I don't have anything else at this point that I want to ask, um uh I'm sure there's

gonna be a other questions that will come up on you know for you guys, there'll be questions gonna come up for us and everything else an, we'll deal with those in the future. K? Um, have you guys got any questions of us?

RayM One big one right now

LW Yea, what's, what are you guys gonna do?

CH I know Dutch ta told you at the beginning of the tape that he said hewould uh since guys come forward and were honest he would speak on you behalf to the District Attorney and all that stuff and I'll do the same thing, so

RM I really didn't mean to

CH Yep

CH I know

CH I'll tell him that we feel that you guys are being up front and honest with us and have been completely honest with us and uh

DW We also tell them too that this statement you've given to us you know you came in voluntarily, you weren't in custody, so you know it took took some doing to do that an we'll go we'll talk about that

RM First night I tried to get ahold of em and they were all saying that Roy (unreadable) I wanted to talk to him (unreadable)

DW You wanted to call Ray right away?

DW OK

DW All right. Let me finish up here and. Now I'm gonna what I'm gonna do is ask these last questions and I'll direct to each one of you, so we get answer from each one of you instead of simultaneously, OK? So we'll start out this way. Randy would you be willing to take a polygraph on the information you've given us?

RM Yes

DW Lonnie would you be willing to take a polygraph on the information you've given us?

LW I don't like it but yea I will

DW Randy if you take a polygraph on the information you've given us would the polygraph show us that what yer telling us here today is the truth

RM It should

DW Lonnie, if you take a polygraph based on the information you've given us today would it polygraph show you're telling the the truth?

LW Yea

DW Randy did you

LW Except for my name

DW Except for my name. OK

CH The reason for that statement is that Lonnie says it he'd taken a polygraph in the past and it only the part that he failed on was whether or now his name was actually

LW Lonnie Ray Woolhiser

RayM We all you're a Moore

DW He's a Moore

(laughter)

DW That's true cuz there's many times

LW except my name

(laughter)

DW Randy did you come to the police station voluntarily?

RM Yes sir

DW Lonnie did you come to the police station voluntarily?

LW Yes sir

DW Randy has this statement been given freely and voluntarily by yourself

RM Yes it has

DW Lonnie has this statement been given freely and voluntarily by yourself

LW Yes

DW Randy has this statement been given freely and voluntarily by yourself knowing that you had the right to counsel?

RM Yes

DW Lonnie has this statement been given freely and voluntarily by yourself know you had a right to counsel?

LW Yes

DW Randy have I or anyone else threatened you in any way to give this statement?

RM No you have not

DW Lonnie have I or anyone else threatened you in any way to give this statement?

LW No

DW Randy have I or anyone else promised or given you anything to give this statement?

RM No you have not

DW Lonnie have I or anyone else promised you or given you anything to give this statement?

LW No

DW Randy is the statement that you you've given me is that the truth?

RM Yes it is

DW Lonnie is the statement you've given me the truth?

LW Yes

DW Randy would you be willing to go into court under oath and tell this the same story?

RM Yes I would

DW Lonnie would you be willing to go into court under oath and tell the same story?

LW Yes

DW Randy is there anything else you'd like to add to this statement that I haven't asked you?

RM Not that I can think of. At this time

DW Lonnie is there anything you'd like to add to this statement that I haven't asked you?

LW No

DW OK. At this point this will conclude the taped recorded statement from Randy Moore and Lonnie Woolhouser. The time according to my watch is 5:13PM, the date is still December the twentieth, 1995, and I'll be turning the tapes off at this time

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

RANDY JOSEPH MOORE, Petitioner, v. MITCH MORROW, Superintendent, Oregon State Penitentiary, Defendant.	Case No. 98C-15019 The Honorable Terry Leggert DEFENDANT'S TRIAL MEMORANDUM

A.

BACKGROUND

Petitioner is presently incarcerated in the Oregon State Penitentiary as the result of a plea of no contest to the charge of Felony Murder with a Firearm in Josephine County Court Case No. 96-CR-0118. Petitioner has now filed a First Amended Petition for Post-Conviction Relief and makes the following allegations:

> The Petitioner's imprisonment is and was illegal and these proceedings resulted in a substantial denial of the Petitioner's rights in violation of ORS 138.530 in that Petitioner was denied the effective and adequate assistance of trial counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under

Article I, section 11 of the Constitution of the State of Oregon in that Petitioner's **trial counsel**:

1. Failed to review Petitioner's statement to the police where investigators continued to question Petitioner despite his request for an attorney.

2. Failed to conduct an adequate and reasonable investigation into the law and facts of Petitioner's case by not employing an investigator and by failing to file a motion to suppress petitioner's confession to police.

[Pages 7 and 8 appear below]

length. (Ex. 108, Jordan Aff, pp 1-2). Petitioner did not dispute any material fact reported in the police reports, including facts demonstrating petitioner and his co-defendants kidnapped the victim. (Ex 108, Jordan Aff, pp 2-3). Rather, petitioner claimed only that he and his co-defendants killed the victim by accident. (Ex 108, Jordan Aff, p 2).

Petitioner will not prove by a preponderance of the evidence that counsel reasonably should have concluded that an investigator would have turned up evidence that would have been helpful to petitioner. As counsel notes in his affidavit, the evidence demonstrated the victim had been assaulted, bloodied, bound with duct tape, placed in the trunk of the car, taken to an isolated rural location, marched into the woods while still bound and shot. (Ex 108, Jordan Aff, p 3). It is simply unlikely an investigator would have

discovered evidence to support petitioner's claim that the victim's death had been accidental.

Similarly, petitioner will not establish he was prejudiced by counsel's decision not to hire an investigator. In order to show prejudice resulting from a failure to investigate, petitioner must show what counsel would have found had he investigated, and moreover, that the evidence would have affected the result of the proceeding. *Carias v. State of Oregon,* 148 Or. App. 540, 543 (1997). Unless petitioner offers evidence satisfying the requirements of *Carias*, his claim must fail.

Counsel rebuts petitioner's complaint that he should have moved to suppress his confession. Counsel offers two reasons for not filing the motion. (Ex 108, Jordan Aff, p 1). Counsel asserts it was clear that petitioner was not in custody when he gave his confession, noting that petitioner "never believed that he was in custody and admitted to me that he realized he was not in custody when he and his brothers and another friend voluntarily came to the police department to give the recorded statement." (Ex 108, Jordan Aff, p 12). Because petitioner was not in custody when he gave his statement, there was no basis for filing a motion to suppress.

Counsel further explains that he did not move to suppress because petitioner had previously confessed his participation in the crime to his brother (Raymond Moore) and another friend. Both Raymond Moore and the friend could have been called as witnesses to repeat petitioner's confession. (Ex 108, Jor-

dan Aff, p 2). A motion to suppress would have been fruitless.

Without sufficient evidence to establish counsel's alleged error had a tendency to affect the outcome of his case, his request for post-conviction relief should be denied.

c. Petitioner's plea was freely, voluntarily, and intelligently made.

Contrary to petitioner's allegation, his plea was freely, voluntarily, and intelligently entered into. In order for a plea of no contest to be considered knowing and voluntary, a defendant must be aware that he is waiving certain constitutional rights. The United States Supreme Court has identified those essential rights as the privilege against self-incrimination, the right to a trial by jury, and the right to confront one's accusers. *Boykin v. Alabama*, 395 US 238, 243 (1969). Oregon has codified this requirement at ORS 135.385 and expanded the list to include a warning of the possible maximum sentence the defendant may receive, the possibility (where appropriate) of receiving dangerous sentencing, and the possibility of deportation if the defendant is not a United States citizen. ORS 135.385(2); *see also, Lyons v. Pearce*, 298 Or 554, 561 (1985).

In this case, petitioner was aware and understood the constitutional rights he waived, prior to agreeing to the plea. Counsel reviewed every aspect of the facts and law with petitioner. (Ex 108, Jordan Aff, p 2). They discussed felony murder, the possibility and consequences of

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

RANDY JOSEPH MOORE,

Petitioner,

v. No. 98C-15019

JOAN PALMATEER, Superintendent, Oregon State Penitentiary,

Defendant.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED That, pursuant to notice duly given to all parties in interest, the above-entitled cause came on regularly for trial in the Circuit Court of the State of Oregon for the County of Marion, at Salem, on the 23rd day of July, 2000, the Honorable Terry Ann Leggert presiding.

APPEARANCES

Mr. Steven H. Gorham, Attorney at Law, appeared on behalf of the Petitioner

Mr. Ward Douglas Marshall, Assistant Attorney General, appeared on behalf of the Defendant.

Transcribed by:
Robin Curl
Court Transcriber
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(Whereupon, the following proceedings were had, to-wit:)

THE COURT: This is Moore v. Palmateer - - is that how you - - Palmateer?

MR. MARSHALL: Palmateer.

THE COURT: 98C-15019. The Petitioner is here represented by Mr. Gorham. The State is represented by Mr. Marshall. This is the time set for the trial in this case and preliminarily - - I know we talked off the record of both parties are not objecting to the other side's exhibits as I understand; is that right, Mr. Gorham?

MR. GORHAM: Oh, I'm sorry, there was one.

THE COURT: Oh. Which was?

MR. GORHAM: Before we start that, I have a certified law student that is a law clerk of mine, Your Honor, Kristin Sager-Kottre. She is certified. Mr. Moore has given her - - us permission that she can conduct this trial if that's acceptable to Your Honor.

THE COURT: It's fine with me. Is that right, Mr. Moore?

THE PETITIONER: Yes.

THE COURT: Okay. All right. Go ahead.

MS. SAGER-KOTTRE: We're objecting to the affidavits. I don't have the - -

THE COURT: 106, 107 and 108?

MS. SAGER-KOTTRE: Correct. Based on the - - that our client has not waived attorney/client privilege on that. It's a standing objection that we're maintaining. We filed a writ of mandamus within the last year.

THE COURT: Is that that same - -

MS. SAGER-KOTTRE: Yeah, same objection.

THE COURT: This is the issue that's currently - - I don't know, has the petition been accepted?

MR. GORHAM: The petition has not been accepted, Your Honor, but it's on appeal in the case that the petition was in and that was a case by the name of Travis Peterson v. - - I believe it was OSP. I would also like permission to submit the actual memorandum that we submitted in that case. As your Honor remembers, various judges in various courts in post-conviction have said various things about the waiver of privilege. Some think just the filing of the post-conviction is a waiver of privilege. Some have ruled that the filing of the post-conviction combined waived the privilege on the particular issues that are involved in the post-conviction. I think - - I can't remember what Your Honor's ruling has been in the past. We don't expect a different ruling. We have no

objection to the State also in the past they've submitted just a counteract memorandum in the Peterson case like we would like to. I don't know if you want to make that an additional exhibit. We didn't bring it in and I apologize. If we could have until Monday. I know the State has multiple copies of it and we're making the same objection.

THE COURT: Mr. Marshall, that's - - I know you're taking over for Ms. Andrus but are you familiar with this issue?

MR. MARSHALL: Yeah, I am somewhat familiar.

THE COURT: Okay.

MR. MARSHALL: The first thing I'd say is the Tisler affidavit would be acceptable in any case because that's an affidavit from the prosecutor.

THE COURT: So you just - - I was going to ask. I knew Mr. Brewer is a defense attorney. I don't know, is Mr. Jordan also?

MR. MARSHALL: Yes. I think he was the trial counsel.

THE COURT: Okay. Well, this Court's ruled that when the - - somebody files a post-conviction and the issue is the conduct of their attorney, they waive attorney/client privilege, but I'll allow you to make the record, Mr. Gorham, and we'll see if the Court of Appeals - - and also you, Mr. Marshall, to supplement it.

MR. MARSHALL: Thank you.

THE COURT: So that would be your Exhibit 108 and the Petitioner- - I'm not sure what number we're at with your exhibits.

MS. SAGER-KOTTRE: No. 9.

THE COURT: No. 9 Okay. So you'll submit that on Monday and we'll just hold the file open to have them submit those exhibits. Okay. And then just one other housekeeping matter. Mr. Gorham, you're requesting to submit a final trial memorandum because you're waiting for the testimony from this case and the cross reference - -

MR. GORHAM: That's correct. I've given Your Honor and the State a copy of your draft. It's pretty close to being done but I wanted to wait to do the final until after we had the actual hearing and heard what the testimony was. So I would be submitting that on Monday, with Your Honor's permission.

THE COURT: And, Mr. Marshall, after you review it, you'll - - if you want to file anything in response, we'll give you two weeks to do that. Just let us know if you are actually going to respond to it. Okay?

MR. MARSHALL: Okay. Thank you, Your Honor.

THE COURT: Thank you. All right. With that, are you ready to proceed?

MS. SAGER-KOTTRE: Yes, we are, Your Honor.

THE COURT: Okay.

MS. SAGER-KOTTRE: We would call Raymond Moore.

THE COURT: Mr. Moore, if you'd stand forward. Come all the way up here, please, and raise your right hand.

RAYMOND MOORE,

was thereupon produced as a witness and having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

THE CLERK: Please be seated and when you're seated, state your name and spell your last name for the record, please.

THE WITNESS: My name is Raymond Leon Moore, M–double O–o–r–e (sic).

THE COURT: M–o–o–r–e?

THE WITNESS: Yes, ma'am.

THE COURT: Got it. Okay. Go ahead.

MS. SAGER-KOTTRE: Just a little bit of background before I start with the questioning. Raymond Moore is here. He is Randy's brother. He's also Lonnie Wilhiser, who was his co-defendant, his brother.

THE COURT: Okay.

MS. SAGER-KOTTRE: And Raymond had had some interactions with the same detectives that were then involved in Randy's case and – –

THE COURT: Right. That's in your brief.

MS. SAGER-KOTTRE: Yeah. Okay. Let me just – –

THE COURT: Yeah.

MS. SAGER-KOTTRE: Okay.

DIRECT EXAMINATION

BY MS. SAGER-KOTTRE:

Q Raymond, I believe in 19 – – in the early 1980s, did you have some interactions with Detectives Huffman and Whitehead?

A Yes, I did.

Q And what happened?

A I worked on numerous sting cases undercover as a confidential informant for both DEA, Oregon State Police, and Josephine County and Jackson County Sheriff's Departments, in which resulted – – which resulted in the arrest of 39 people and the disbanding of numerous laboratories for methamphetamines and the officers involved, I've known them for about 10 or 15 years at that time.

Q Were you ever involved in any shootings or – –

A Yes, ma'am, I was. In 1985, I believe it was – – '84, '85, I was taunted to come to a per said friend of mine's house in which somebody had put out a bounty on me and – – excuse me – – at that time a friend would not let me go alone. I talked – – persuaded him to allow the weapons to be left at home. We dickered and came to leave one vehicle in the – – one rifle in the vehicle. I tried to go in alone and ended up with them firing six shots, shooting two of the guys with me, sending two bullets past my head. I ran to the vehicle and got the weapon and went back and killed my friend as he was aiming at another person who was shot twice. It's not a very good memory.

Q Okay. Just take your time.

A So at that time I had fled fearing to be shot because there was a shoot-on-sight order one me and at a later interval I had called them, told them what happened and that if they would release the people they had in custody who were innocent, I would surrender.

THE COURT: When you say them, you talked to who?

THE WITNESS: I talked to Josephine County Sheriff's Department, to Detective Allen Pendergrass who was the head of narcotics, and I can't remember who it was that was head of homicide at that time but – –

THE COURT: It was the police you're talking about?

THE WITNESS: Yes, ma'am.

THE COURT: Okay. Go ahead.

THE WITNESS: And they agreed, I surrendered myself and took a polygraph and was acquitted, self defense and defense of the lives of others.

BY MS. SAGER-KOTTRE: (Continuing)

Q Were Detectives Whitehead and Huffman part of this process?

A Yes, ma'am, they were. They were both on the Josephine County Sheriff's Department assigned to the Illinois Valley which is Cave Junction which is the same place where Lonnie and Randy's incident occured.

Q And did they have anything to do with your turning yourself in and the self defense?

A Yes, they did. They pursued me, basically. But Allen Pendergrass, who later became the undersheriff and last year was relieved when the new sheriff came in, he was basically the one that handled that but his backups, I believe, were Whitehead and Carol Huffman.

Q So what was your relationship with those detectives?

A We had had a pretty good relationship up to that period of time. Later we became very good relationship, the kind what you'd say the golden child for them from turning a new leaf and becoming a – – not only law-abiding citi-

zen, but to go on and further myself, to become a respiratory therapist and working on the team and some acute care for the elderly and – –

Q When – – we're going to go forward now to the incidents surrounding your brothers, December 1995. Were you contacted by your brothers?

A Yes, I was. And they had requested that I come – – I was living in Medford approximately 50, 60 miles away from them, and they had requested me to come over and talk to them and since that wasn't very common, I knew it was something important.

Q They requested you to go talk to them?

A That they needed to talk to me. At that time I had no idea what. When I did show up over there – – because I dropped everything and got off work and headed right over and I talked to them at Lonnie's house at which time they basically ran down to me the scenario that had occurred and asked me what they should do.

Q And what did you tell them?

A I told them that we had three options. One option, they run and which at some point they would be caught and the odds are that they would be killed. Number two, they try playing it off and, you know, hope that they didn't get caught.

THE COURT: What do you mean, playing it off?

THE WITNESS: Play it off like they didn't have anything to do with it, you know, they didn't know anything about it. Knowing my brother Randy, that was impossible. Randy has – – he's got a conscience that's just – –

THE COURT: I'm just still trying to figure out what the term is. So what you mean is just act like you didn't know anything about it?

THE WITNESS: Yeah. Act like you didn't know anything, you know, deny everything.

THE COURT: Okay. And would they have told you they did know something about it so you couldn't play it off?

THE WITNESS: Not really at that time. They just told me what – – that the police officers had picked them up the day before in regards to a murder and that they let them go until they talked to me because they wanted some advice from someone.

THE COURT: Okay. Go ahead. I Just – – I need to understand your terminology.

THE WITNESS: Oh, you bet. Yeah.

THE COURT: Okay. Go ahead. And then the third option. You said – –

THE WITNESS: And then the third option was to stand up like men and be accountable. If it was an accident like they had told me, then

they would have nothing to worry about. The police department had worked well with me and I believed that they would do the same with them if they had told them.

BY MS. SAGER-KOTTRE: (Continuing)

Q What was your – – what is your relationship with Lonnie Wilhiser, just to clarify?

A Lonnie Wilhiser – – it's hard for me to say. He's my stepbrother. In my family we don't have steps, okay. My father adopted him, he's my brother. Okay. Lonnie more or less had idolized me in a sense for – – since his childhood. I was a motorcycle ride and ornery and didn't take no guff, you know, that kind of routine. And he has that kind of as a item, you know, what he wanted to be.

Q So you're the older brother – –

A Yes, I am.

Q – – to both of them? Okay. So you talked to your brothers and explained what had happened with you.

A Yeah.

Q So what happened next?

A Next I waited for them to make their own decision. They're both adults, you know. I can't really force them to do – – and I told them that I – – I advised them to take the last option which was to go in and to depend on the leniency and the understanding of the court.

Q And did they – – were they – – did they try to find an attorney at that time?

A What happened was, when we went in for the questioning, they asked me to be with them so I took them in.

THE COURT: When was this in relation to the time that you talked to them?

THE WITNESS: That was, I believe, the next day, if I'm not mistaken. It could have been the same day.

THE COURT: Close in time?

THE WITNESS: Yeah.

THE COURT: Okay.

THE WITNESS: It could have been the same day but I believe it might have been the next day.

THE COURT: Okay.

BY MS. SAGER-KOTTRE: (Continuing)

Q Who is it – – when you say they asked you to come in with them, your brothers?

A Yes, my brother Randy and Lonnie asked me if I would take them in because they knew the rapport I had with the police department and when I got in there, my closest friend – – I call him Uncle Al – – he wasn't there but Officers Whitehead, Officer Carol Huffman and there was another officer – – I can't seem to remember his name presently

though – – were all three there. We went to a room, conference room. I started talking to them a little bit and then my brothers stated that they thought it was best if they didn't say anything until they'd talked it over with an attorney. At that particular time, Officer Whitehead spoke up and said that they were not under arrest, therefore they didn't need an attorney. In order for them to get an attorney, they had to first arrest them. And this really made no sense to me, okay, because Miranda states that we have the right to an attorney during any and all questioning and the right to stop at any and all questioning at any point to request an attorney, yet they were saying they couldn't get us an attorney until they were lodged in the county jail.

Q Were your brothers free to leave the police station at that time?

A They made it appear that way but I remember when Randy wanted to go to the bathroom, that the officer stayed right with him all the way to the bathroom and then to the drinking fountain. And which I know this because I was out taking a little walk. They were smoking and I don't smoke so I took a little walk at that period of time and that's when I ran into Allen Pendergrass, detective, and he gave mea hug and told me thanks for bringing them in.

Q And he was the – – what was his position at that time?

A He was the undersheriff, captain of the Josephine County Sheriff's Department and the Head of narcotics and JAGNET.

Q Did the detectives make any promises to your brothers?

A Yes, they did. They told them that – – well, to quote, you may ask your brother, we are very fair and very willing to help you out of this, we know you've got a conscience and it bothers you and you need to relieve yourself of this, we're here. And basically what I had deducted from what they had said was that they would work for him like they had worked for me to change my life around.

Q And you had told your brothers this?

A Yes, I did. Unfortunately, I had advised them with that – – that they were men of their word because they had stand good with my word, you know, with their words to me. And they had told them that – – well, they had basically told them that they would go to bat for them.

Q And what did you – – what was your understanding of "go to bat"?

A I meant – – when they told me "go to bat", this was an accident. The judge, the District Attorney, both at the end of the court, at the hearing, stood up and said, and I quote, Mr. Moore, we do know and believe this to have been an accident. Unfortunately, due to

Measure 11, our hands are tied. At that time I – –

MS. SAGER-KOTTRE: We have no further questions.

THE COURT: Okay. Do you have any questions, Mr. Marshall?

MR. MARSHALL: I have just a few. Thank you, Your Honor.

CROSS EXAMINATION

BY MR. MARSHALL:

Q Mr. Moore, how was this an accident?

A What was happened – – and the reason of Measure 11, to my understanding, was invoked in this matter was because these people were all friends. They were real close and we had family reunions, the first in 21 years. Mr. Rogers, who was the victim at this point, was there. Unfortunately, they all three, Randy, Lonnie and Mr. Rogers, all liked to drink, and the way it was an accident was that Mr. Rogers' wife had gone somewhere with another person of – – the third party in this suit, and had taken her to Texas. During this period of time, Mr. Rogers had burglarized his home. They were all, like I said, a real close knit group, you know. They called each other brother and this routine. Well, when the other person got back from Texas and discovered this, he showed up over at Lonnie's house where Randy was that morning and he was – –

there was a couple cases of beer and started drinking and basically, to my understanding this is, instigated them into going up and, as they put it, spanking their other friend because friends do not rob friends. And in the process of this, I guess, to make an example and put some scare into Mr. Rogers so he did not do this thing again, they had blind-folded him to duct taped him and put him in the trunk of the car and took him out to a place that's a little remote, not a lot. The gentleman was a large size guy and didn't walk much and stuff. And their intent was to leave him there and make him walk home, you know, after he freed himself. This here, of course, is the kidnapping that's involved in this case because they took him somewhere against his will. This is why the judge said that there was the commission of a felony during a felony, is an automatic. Or the commission of a crime during a felony.

THE COURT: A murder during the commission of a felony.

THE WITNESS: Yes. Thank you. However, during this period of time, Lonnie who is a little rowdier – – he's a good boy but he's just a little rowdy. He'll fight at the drop of a hat. He had in his possession a .22 magnum pistol in which Mr. Rogers had given to him previously – – given or traded, I'm not sure which. And Randy, while they were pushing Mr. Rogers up the hill, kind of muddy, it's during winter and we have a lot of red mud down there, Randy

had taken the revolver from Lonnie and at the time he had taken it, Mr. Rogers had slipped backwards on the mud and the gun discharged. I'm not sure of all the exact details because this is basically hearsay. It's what was stated in court and it's what they had basically told me after the incident, too, before I took them in, or on the way in. Had it not been the way it was – – I mean, Randy's not violent at all. I haven't even known Randy to get into fights, you know. Had it been Lonnie, I might have had another thought, just like had it been me, I may have had other thoughts on it, you know. And I love them both dearly, okay, but I have a bad temper and Lonnie has a similar, but with Randy, there's no way I could believe anything else.

BY MR. MARSHALL: (Continuing)

Q It's correct, isn't it, sir, that they actually beat up Mr. Rogers before they put him in the trunk?

A Yes, they did. I heard that they did beat him up up there at the – – his RV when they first got there with this third party, Roy, I believe.

Q And then they duct taped him and shoved him in the trunk?

A Yes, to my understanding.

Q And took him out on the country road?

A Yes. This country road they're talking about runs beside a main highway, kind of – –

it's the old Highway 99 is what it is, and it's maybe five miles long, the whole thing, and about half way through, to my understanding, where the logging all occurred, they was going to take him up there and leave him. His health wasn't exactly any – – you know, wasn't great. He was on social security, he drank a lot and he hardly did anything except drink and party.

Q Were you present with your brothers when they were being interviewed by Detective Whitehead and Huffman?

A Yes, sir, I was.

Q Did you suggest to them at any point, why don't we just leave and go talk about this before we resume or continue this interview?

A I don't believe that I did. I believe that the officers were rapidly befriending us, so to speak, and when we had requested the attorney and they had shot that down, I had mentioned to them something about, you guys gotta think this out and figure this out yourselves what you want to do on this, because, you know, I guess basically, you can say I was covering myself. You know, if they decided to talk and things didn't go right, then I wouldn't have to carry a big guilt.

Q Right. So at – – what, at a break or something, you said, look, Lonnie and Randy, you gotta think this through?

A Yeah. Because they had shut off the tape numerous times during the interview and, you

know, they sat back and they smoked cigarettes and they talked and, you know, and I, myself, at that particular point, I believed them. Okay, they had worked real good with me, they had all received promotions out of our work together and I also voted yes on Measure 11 without comprehending all of the facets that are involved within it.

Q There was no question that your brothers were not under arrest; is that right?

A You know, there wasn't in my mind until it came to the point when Randy wanted to go to the bathroom, the officer had to stay with him, and that really bothered me and that's what I told Allen too.

THE COURT: Allen?

THE WITNESS: Allen Pendergrass, I'm sorry. I seem to think that everyone knows who he is.

THE COURT: Okay.

BY MR. MARSHALL: (Continuing)

Q You were pretty savvy though about police procedures at that point, correct?

A Not really. I was rather trusting but I wouldn't say I was savvy. I have had courses in criminology and I've had – – I worked for a while as a juvenile probation counselor for the county during the years where I was trying to make changes in my life, but I guess I just really wasn't understanding.

Q I take it you weren't so uncomfortable that you didn't say to your brothers, let's just go?

A No. I did not – – honestly, I did not believe that we would be allowed to leave – – that they would. Okay. And that is because they had let them go the day before to talk to me and just the whole demeanor. When I had asked the officer when we first got into the room, I asked them if it was okay if I recorded the whole conversation in which I was – – oh, yeah, let us go get our tape recorders too. And I really had the feeling that they were not going to be able to walk out of there because basically when they first asked for the attorney and they said could not do it without arresting them first, there was a long pause at that period of time. I wanted to see whether or not – – I was interested in whether or not they were going to arrest them at that time or what. Instead, after they waited for my brothers to say something in which they didn't they went – – sent one of the detectives off to call the District Attorney and he returned in about 10 or so minutes and I didn't hear exactly what he said to the other detectives at that time.

MR. MARSHALL: Nothing further, Your Honor.

MS. SAGER-KOTTRE: Just two questions.

REDIRECT EXAMINATION

BY MS. SAGER-KOTTRE:

Q Did Randy's trial counsel ever contact you?

A Randy's trial counsel contacted me one time in regards to the tape. He wanted a copy of the tape in which I had instead of their tape, and I went in and gave him the copy and at that time was when I discovered that he was a leader in my church and which we took a little more time and talked a little more thoroughly. However, if I may – – and this is off of the – – I was very disappointed in him because I had figured as being an elder, a high priest of our church, that I could trust him and during the trial, he basically did nothing. I didn't even hardly hear any cross-examinations or anything from him. He allowed Lonnie's attorney to do most of it.

Q Did he discuss with you Randy's request of an attorney?

A Yes, he did. He had mentioned that and he said, well, basically, there was nothing that they could do because at that point they should have never said another word and through an interval – – I guess an interval of about 10 to 15 minutes during the silent, you know, thing for them to decide what they were going to do and talk – – call the District Attorney – – the police officer, they went on talking about other things and then gradually led right into it and they went ahead and told them what had occurred.

MS. SAGER-KOTTRE: No further questions.

THE COURT: Okay. Anything else?

MR. MARSHALL: No. No, Your Honor.

THE COURT: Okay. You can step down. Any other evidence?

MS. SAGER-KOTTRE: Yes. We would call Randy Moore.

THE COURT: I thought it was going to take 15 minutes. Is this short?

MR. MARSHALL: This will short, Your Honor. There is a deposition that's just some questions.

THE COURT: Just going to supplement it. Okay. Come on forward.

RANDY MOORE,

was thereupon produced and having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

THE CLERK: Please be seated and once you're seated, state your name and spell your last name.

THE WITNESS: My name is Randy Joseph Moore, M–double O–r–e.

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MS. SAGER-KOTTRE:

Q Mr. Moore, did you take part in the beating of Kenny Rogers in the trailer house?

A No, I did not. At the time when he was beat, I was still in the vehicle outside of his RV.

Q And was his shooting an accident?

A Yes, it was. I took away the gun from Lonnie because when Lonnie was trying to push him up the hill, he was staggering and slipped on the mud. I took the gun from Lonnie and at that time Kenny slipped and landed on me and the gun discharged.

Q When you went to the police state the first time on December 19th, what did the police tell you when they released you?

A When – – first when they were talking to me about it and our co-defendant had already seen the murder that day and hadn't returned so I knew something was up and then they were asking questions about it and I invoked the Fifth, and they stopped and came back about 10 minutes later and they said, well, we contacted your brother Ray we'll release you only if you go see your brother Ray and come back tomorrow at 1:00.

Q When you went to your brother Ray's – – when you talked to your brother Ray, did you try to get an attorney at that time?

A Yes. We called around Medford trying to find an attorney and we couldn't get an attorney to take the case in Josephine County. And at 3:00 – – at 1:00 we were scheduled to go back. We called the sheriff's department and at that time they told us that if we were not there by 3:00 they would come get us – – us and our family would not like the way they did it and they – – we knew what they meant.

Q When you got to the police station and the police began questioning you, did you ask for an attorney?

A Yes, I did. I asked for an attorney and they – – Detective Whitehead had told me they could not give me an attorney at this time unless they charged me and I told them, okay, charge me.

Q And did they charge you at that time?

A No, they didn't. They started talking about what they could do for me like they did for my older brother Ray and that, and this went on for about 25, 30 minutes and they convinced me to waiving my right to an attorney and giving a confession of what happened and they said they'd go to bat for me like they did for my brother Ray. At that time we told them, okay, they convinced us into talking to them, okay, and Whitehead said he would take a break now and he'd go talk to the D.A. and make sure the D.A. wouldn't jab us later on down the road.

Q What was your understanding of "go to bat for you as they had done for your brother"?

A They would see to it was charged as an accident, not a murder.

Q And what was your understanding what the result – – when they had gone to bat for your brother, what was the result?

A The result with him when they went to bat for him that time was all charges were dropped.

Q And you felt they would do the same for you?

A I felt they – – I knew the death had happened and it wasn't in defense of somebody so I was going to get something out of it but not murder. I did not murder nobody. I accidentally killed a friend of mine. I did not murder nobody. And that was my understanding is when he said he was going to see the D.A. to make sure the D.A. wouldn't jab me later on down the road, that he was going to charge me with accidental death.

Q When you were at the police station, did you feel you were free to leave?

A The mentioned a couple of times we were free to leave but every time like if I went to get a drink of water, the deputy escorted me there to get a pitcher of water. After I drank the water I had to go to the bathroom, he escorted me to the bathroom, waited outside the

door and escorted me back to the questioning room. And I knew when we went there, we weren't going to come back. They made it obvious the night before in a conversation on the phone that our co-defendant was charged and that we were going to be booked that day. We were prime suspects.

Q So your co-defendant was already in custody?

A Yes, he was.

Q And who was that?

A Roy Salyer.

Q Okay. When were you formally arrested?

A I guess we were formally arrested the next day when they arraigned us.

Q Were you allowed to leave that evening?

A No, we were not.

Q So you were placed in custody that night?

A After they read us rights and we told them what had happened, after he came back from talking to the D.A., he did not tell me that the D.A. did not agree to not jab us later on down the road. He told me that he was wrong in saying he couldn't get me an attorney, he could get me an attorney if I wanted one, but at that time we'd already decided to talk. So he read us our rights, we told him what happened and then we took them out down to the cell

block and gave them the pistol because they had not located the firearm at that time and they brought us back, never charged or nothing and just kept us in jail and the next day when they arraigned us they formally charged us.

MS. SAGER-KOTTRE: We have no further questions.

THE COURT: Any questions?

MR. MARSHALL: Very few.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. MARSHALL:

Q Mr. Moore, if I understand right, you said that you wanted an attorney and the detective got up and went out and called the D.A. at that point?

A No. At that point, I stopped, sat back for a minute and then said, well, we can't give you an attorney at this time.

Q Okay. But at some point they talked to the D.A. and the D.A. told them they could give you an attorney?

A Yeah. That was after we – – about 30, 40 minutes later after we decided we was going to talk, he said he would stop, before we say anything, we'll talk to the D.A., make sure the D.A. would not jab us later on down the road. Well, he came back about 10, 15 minutes later and said, well, he was wrong, he could give us

an attorney, but if we wanted to go ahead and talk, go ahead and talk. And we did.

Q Okay. Okay. And at that point had you told them what had happened?

A No. We hinted to what had happened.

Q Well, when he said he would get you an attorney, why didn't you say – – did you say, okay, get us an attorney, then we'll tell you what happened?

A No, I didn't. At that time he'd already convinced me it was the best interest to talk. He went to talk to the D.A. and didn't say the D.A was not going to jab us. He didn't say nothing about the D.A. at all when he came back. He just said he was wrong about not being able to give us an attorney is all. He didn't say, well, the D.A. didn't agree. If he would have said the D.A. had not agreed, then I would have instantly said no, I want an attorney, but he didn't even mention nothing about the D.A. He left me believing that the D.A. had agreed not to jab us down the road.

Q So you thought that the detectives were going to go to bat, you didn't need an attorney, go ahead and tell them whatever you wanted to?

A Well, when the detective went and talked to the D.A. to make sure he wasn't going to jab me, I thought there was an agreement that they were going to charge me with accidental death and the D.A. had agreed to it be-

cause he didn't come back saying that he did not agree, and that's what he went there for.

Q Did you stop and talk to Raymond and ask him, okay, now, here's the deal, they may jam us, they may not jam us, I think they're not going to jam us but they'll give me an attorney now before I say anything, what shall we do?

A No.

Q Okay. But it was clear you could have had an attorney at that point?

A At that pint could have wanted to but he'd already convinced me into talking about it at the time.

MR. MARSHALL: Nothing further, Your Honor.

THE COURT: Okay.

MS. SAGER-KOTTRE: Just one question.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MS. SAGER-KOTTRE:

Q In your mind, what – – what charge is an accident death? What crime is that?

A Manslaughter, Criminal Negligent Homicide.

MS. SAGER-KOTTRE: Nothing further, Your Honor.

THE COURT: Thank you. You may step down. Okay. I just want to clarify one thing in the briefing. I guess there's – – occasionally the Petitioners use 137.165 and there's 137.635 – – I think it's 137.635 that we're operating on – – on that error in terms of – –

MR. GORHAM: Yes, Your Honor. If you were reading the draft memo, I know we put it in two different ways and that's one of the things I'm going to make sure is corrected.

THE COURT: Good. The respondent has just said he, assuming for the purpose of briefing, is that you were operating under 137.635 so I just wanted to clarify that too.

MR. GORHAM: I think so, Your Honor.

THE COURT: Okay. That's just that – – it's a determinate sentence, it's not Measure 11.

MR. GORHAM: We're talking about two determinate sentences, Measure 11, if you will, and Denny – – what I call Denny Smith and that's the statute and I did notice in my draft memo it was put in two different ways.

THE COURT: Okay. Until we get the briefing from – – your final draft by the 28th and then – – I just want to know if you're going to respond because I'm going to try and draft an opinion if you're not going – – I won't wait for any more briefing from you if you let us know. And if you are going to do more briefing, I'll wait until it's all in.

MR. MARSHALL: I'll let you know within a day or so after I receive it, Your Honor.

THE COURT: Great. Okay. Because I can't go to – – take it under advisement until I have all the briefing.

MR. GORHAM: No. That's fine, Your Honor, and I don't usually mail it, I usually hand deliver it so it will be hand delivered to the State on Monday.

THE COURT: All right. Thank you.

(Proceedings concluded.)

CIRCUIT COURT
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
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PO BOX 12869
SALEM, OREGON 97309-0869

Terry Ann Leggert
Circuit Court Judge
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April 5, 2000

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Re: Moore v. Palmateer
Case No. 98C15019

Dear Counsel;

After reviewing the briefs, exhibits, testimony and arguments of counsel, the court denies petitioner's request for post conviction relief. The court finds that there is no credible evidence that the petitioner was denied effective assistance of counsel. The court specifi-

cally adopts the factual and legal arguments presented in defendant's trial memorandum with the following clarifying statements.

The court believes trial counsel's affidavit. In addition, the court finds that there is very little chance that the petitioner's confession to the police would have been suppressed. Further, even if his confession had been suppressed, there were two other witnesses to testify to the same information contained in the police confession. The trial counsel obtained the best plea offer he could for the defendant and the defendant accepted this offer after careful consideration.

The claims regarding the petitioner's lack of understanding of the results and the nature of his plea are unfounded. The trial counsel's rendition of what occurred is substantiated by the lengthy colloquy between the trial court and the petitioner, as reflected in the transcripts provided as an exhibit.

Finally, the mistake regarding which sentencing statute is applicable has no effect whatsoever on the petitioner's sentence, therefore, petitioner cannot prevail on this claim.

Defense counsel shall prepare the appropriate judgement. Both counsel must please arrange to retrieve their exhibits. The court marked and admitted the brief submitted by defense counsel as defendant's exhibit 109. (Pe-

titioner had pre-marked their brief as exhibit 9 and it was admitted post hearing by the court.)

Sincerely,

/s/ Terry Ann Leggert

Terry Ann Leggert
Circuit Court Judge

cc: Court file

Following the state post-conviction hearing, the state post-conviction court's opinion letter (J.A. 174) asked the state to "prepare the appropriate judgement."

In response, the state submitted a judgment, along with a document titled "Findings of Fact, Conclusions of Law." The court's findings and conclusions appear at App. 167. Each page of the Findings of Fact, Conclusions of Law contained a footer that identified the Oregon Department of Justice address. For example, the first page of the document appeared as follows:

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

RANDY JOSEPH MOORE,

Petitioner,

v.

JOAN PALMATEER, Superintendent, Oregon State Penitentiary,

Defendant.

No. 98C-15019
Honorable Terry A. Leggert

FINDINGS OF FACT, CONCLUSIONS OF LAW

This matter came before the Court and the Honorable Terry Ann Leggert for trial on petitioner's First Amended Petition for Post-Conviction Relief. Petitioner appeared in person and by his attorney, Steve Gorham, and defendant appeared by and through her attorney, Ward Douglas Marshall, Assistant Attorney General.

In this proceeding, petitioner contends that his conviction in Josephine County Case No. 96-CR-0118 is void and the subsequent sentence invalid in that the conviction was obtained in violation of his constitutional rights.

Specifically, petitioner claims that:

> The Petitioner's imprisonment is and was illegal and these proceedings resulted in a substantial denial of the Petitioner's rights in violation of ORS 138.530 in that

Petitioner was denied the effective and adequate assistance of trial counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article I, section 11 of the Constitution of the State of Oregon in that Petitioner's trial counsel:

Department of Justice
1162 Court St. NE, Rm. 100
Salem, Oregon 97310-0506
(503) 378-6313

J. A. 179

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

RANDY JOSEPH MOORE,

Petitioner-Appellant,

v.

JOAN PALMATEER, Superintendent, Oregon State Penitentiary,

Defendant-Respondent.

Marion County Circuit Court No. 98C15019

Appellate Court No. A110886

RESPONDENT'S BRIEF

Appeal from the Judgment of the Circuit Court
for Marion County
Honorable TERRY ANN LEGGERT, Judge

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ANSWER TO ASSIGNMENT OF ERROR NO. 2

Petitioner failed to prove that trial and appellate counsel were inadequate.

ARGUMENT

A. Standard of review

To prevail on a claim for post-conviction relief, a petitioner must show by a preponderance of evidence both that trial counsel acted unreasonably and that counsel's conduct prejudiced the petitioner. ORS 138.620(2); *Stevens v. State of Oregon*, 322 Or 101, 108, 902 P2d 1137 (1995); *Strickland v. Washington*, 466 US 668, 687, 690, 104 S Ct 2502, 80 L Ed 2d 674 (1984). The first prong of that inquiry asks "whether counsel failed to raise reasonable issues at trial that were fundamental to [the] defense." *Lovelace v. Zenon*, 159 Or App 158, 161, 976 P2d 575 (1999), *rev den* 329 Or 589 (2000). In making such an inquiry, this court is reluctant to second-guess counsel's tactical choices:

> The form of acceptable advocacy varies from case to case. * * * [C]ounsel [may] deem it advisable to * * * offer the one seemingly strongest defense. In any case, the strategy, tactics, and manner of advocacy of the defense are for counsel to determine based upon the exercise of professional skill and judgment.

Krummacher v. Gierloff, 290 Or 867, 875, 627 P2d 458 (1981). Prejudice is demonstrated by showing "that trial counsel's advice, acts, or omissions had 'a tendency to affect the result of the prosecution.'" *Ash-*

ley v. Hoyt, 139 Or App 385, 392 P2d 393 (1996), *quoting Stevens*, 322 Or at 110 (emphasis omitted). In the context of a conviction based on a guilty plea, to show prejudice, petitioner had to establish that he would not have entered into the plea agreement if his counsel had performed reasonably. *Long v. State of Oregon*, 130 Or App 198, 203, 880 P2d 509 (1994).

This court's review of the judgment of a post-conviction court is for errors of law appearing on the record. ORS 138.650; ORS 138.220; *Chew v. State of Oregon*, 121 Or App 474, 476, 855 P2d 1120, *rev den* 318 Or 24 (1993). This court determines whether the facts found by the post-conviction court are supported by evidence in the record, and whether the legal conclusion drawn from those facts is correct. *Chew*, 121 Or App at 476. If the post-conviction court fails to make express findings and there is evidence from which such facts could be decided more than one way, this court presumes that the facts were decided in a manner consistent with the ultimate conclusion made by the trial court. *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968); *Chew*, 121 Or App at 476-77.

B. Trial counsel reasonably investigated and did not move to suppress defendant's confession.

On appeal, petitioner simply includes the identical argument he made before the post-conviction court, in which he asserted that counsel should have moved to suppress his confession to detectives on the ground that the detectives violated his rights to counsel under the Fifth and Sixth Amendments to the United States Constitution, and on the ground that his con-

fession was coerced. (*Compare* App Br 19-29 to Trial Memo 8-19). He does not explicitly challenge or discuss any of the findings or conclusions of the post-conviction court. (App Br 19-29). The post-conviction court's findings dispose of his claim.

1. Trial counsel reviewed and discussed petitioner's confession with petitioner.

The post-conviction court found that trial counsel reviewed petitioner's confession many times and discussed it in detail with him. (App-3). In addition, the court found that petitioner had admitted to counsel that his statements were true and accurate. (*Ibid.*). On appeal, petitioner does not challenge those findings, and they are supported by evidence in the record, specifically counsel's affidavit. (App-8). Thus, the post-conviction court's findings are binding on this court.

2. Trial counsel reasonably concluded that a motion would be fruitless.

Petitioner's claim that trial counsel should have moved to suppress his confession is based on a number of legal arguments, each of which fails in light of the post-conviction court's unchallenged factual findings. In addition, petitioner confessed to witnesses other than the detectives. Thus, because the admission of testimony regarding those confessions is unchallenged, petitioner was not prejudiced by counsel's

decision not to challenge his confession to the detectives. This court should reject his current arguments.[6]

a. Trial counsel acted reasonably.

Petitioner makes the following three assertions in support of his claim that counsel should have moved to suppress his confession: (1) that the detectives continued to question petitioner after he asserted his "right to counsel"; (2) that petitioner was not advised of his *Miranda* warnings before custodial questioning by the detectives; and (3) that his confession was "coerced" by false promises by the detectives. The post-conviction court's findings dispose of each of his arguments.

As to his first two arguments – that detectives questioned him despite his "invocation" of his right to counsel, and that they failed to advise him of his *Miranda* rights – the post-conviction court correctly concluded that trial counsel reasonably did not move

---

[6] At the end of his argument regarding counsel's failure to file a motion to suppress petitioner's confession, petitioner raises the issue of counsel's failure to move to suppress the use of a photographic throwdown. (App Br 27-29). Not only did petitioner fail to raise a claim on that basis in his post-conviction petition, but the respondent is unable to find any evidence in the post-conviction record regarding any infirmity in any photographic throwdown. Because petitioner did not raise a claim on that basis in his petition for post-conviction relief, the post-conviction court correctly did not address the arguments made as to the throwdown issue in petitioner's trial memorandum. *Bowen v. Johnson*, 166 Or App 89, 999 P2d 1159 (2000).

to suppress his statements on those grounds. A person who is in "full custody" must be given *Miranda*-like warnings before being questioned. *State v. Carlson*, 311 Or 201, 204-05, 808 P2d 1002 (1991). In addition, such warnings may be required in circumstances that, although they do not rise to the level of full custody, create a "setting which judges would and officers should recognize to be 'compelling.'" *State v. Magee*, 304 Or 261, 265, 744 P2d 250 (1987).

The post-conviction court concluded that trial counsel was reasonable in believing that a motion to suppress would have been meritless. (App-3 to App-4; App-8 to App-9). Both the court and counsel correctly concluded that petitioner was not in custody at the time of the questioning. (*Ibid.*). First, petitioner did not subjectively believe that he was not free to leave at the time of questioning. (App-3 to App-4). In addition, petitioner and his co-defendant told the detectives that they had come to the sheriff's office voluntarily, and that neither of them were in custody or were charged with any type of a crime at the time. (App-4). Under those circumstances, a reasonable person would not believe that he or she was in custody. Thus, *Miranda*-like warnings were not required.

Because petitioner was not in custody, trial counsel reasonably did not move to suppress the confession on the ground that detectives failed to honor an invocation of a Fifth Amendment right to counsel or on the ground that the detectives violated his *Miranda* rights. Thus, the post-conviction court correctly concluded that petitioner failed to prove his

claim of inadequate assistance of counsel on that basis.

The post-conviction court also correctly rejected petitioner's claim that trial counsel should have moved to suppress his confession on the ground that it was coerced by false promises by the detectives.

Under Article I, section 12 of the Oregon Constitution, a confession or admission is involuntary, and thus inadmissible, if it is induced by a direct or implied promise of leniency. *State v. Ely*, 237 Or 329, 335, 390 P2d 348 (1964). In addition, ORS 136.425(1) provides that a confession is inadmissible "when it was made under the influence of fear produced by threats[.]" Although petitioner relies on both the statutory and the constitutional provision, he does not offer a separate statutory analysis. Thus, this court should treat them the same. *State v. Goree*, 151 Or App 621, 630 n 1, 950 P2d 919 (1997).

Petitioner did not prove that he was induced to confess to the killing by any promise of immunity or lenient treatment in this case. Thus, counsel was not unreasonable in not moving to suppress the confession on that ground. Petitioner, in his brief, cites a portion of the petitioner's interview with detectives, in which the detectives talk to petitioner about "going to bat" for him if he tells the truth. (App Br 25). However, a subsequent portion of the interview clarifies that the promise to "go to bat" for petitioner was not a promise of leniency that entitled petitioner to suppression of his confession.

Although the detectives told petitioner that they would go to "bat" for him, the record shows that that promise was not a promise of immunity or leniency that rendered his confession involuntary. The context of those statements shows that the detectives were not referring to any kind of immunity, and were not promising not to prosecute him in exchange for a confession. Rather, they were promising to call the prosecutor and make a recommendation:

> [Detective]: * * * The thing is, you said you'd like to straighten this thing out, and you can do so but you don't want to get Lonnie hurt.
>
> [Petitioner]: Uh-huh.
>
> [Detective]: Okay. Not until we can turn around and take what you're going to say to straighten things out, [go] to the D.A.'s office, and ask about Lonnie's behalf. The same thing goes with Lonnie, whatever he says, if he doesn't want tog et you hurt, he turns around and tells us, we got things that we know that we can corroborate what you're telling us is the truth, we'd go to the D.A. for Lonnie on your behalf. Okay? Carroll and I both told both of you guys that the other night, we would go to bat for you as long as we got the truth.
>
> * * * * *
>
> [Detective]: Okay, so that you know you're going to get a fair shake from us

> alright, I want to verify that with our DA that he is not going and turn around and jam you. I want him to tell me right now on the phone that you can change your mind and he will accept it. So there's no jammin' down the road, okay?
>
> [Petitioner]: Okay.
>
> [Detective]: So give me a minute and let me go call him.

(Ex 4 at 5-6). While that detective, Detective Whitehead, left the room, petitioner and the others remained in the room, without discussing the offenses, until the tape shut off. (Ex 4 at 6-14). When they reconvened later the same day, Detective Whitehead asked petitioner regarding his understanding of what the detective had agreed to do:

> [Q]: Has anyone promised you anything to give us a statement here today?
>
> [A]: Not other un helpin the best you could
>
> [Q]: And I what I told you there that with a with a statement just like I told everybody else involved in this investigation with a statement that comes truthfully I would go make the recommendations and thats thats for my (unreadable)
>
> [A]: Yep.
>
> * * * * *

> [Q]: So thats what I've promised ya
>
> [A]: Thats all ya promised me
>
> [Q]: Ok. Have we in any way threatened you to come here in the Sheriff's office today?
>
> * * * * *
>
> [A]: No.

(Ex 4 at 15-16).[7]

Not all "promises" by police render a resulting confession involuntary. The reason for the "confessions-induced-by-a-promise-of-leniency-are-involuntary" rule is that it "is assumed that when a person confesses in response to a promise that the person will not be charged with the crime for which the confession is made, the person's confession is not the product of an essentially free and unconstrained choice." *Goree*, 151 Or App at 632; citing *State v. Aguilar*, 133 Or App 304, 891 P2d 668 (1995). In this case, detectives made no suggestion that petitioner would not be

---

[7] Although the interview transcripts were received as a single exhibit, the pages are not numbered accordingly. The pages of the second transcript, which contains the portion of the interview after the parties reconvened after the detective's telephone call, begin again at page 1. Since the first page of that second transcript is found immediately after page 14 of the first transcript, respondent is treating that page as page 15 and treats the following pages accordingly.

charged for a crime if he confessed. In fact, petitioner and his co-defendant acknowledged as much:

> [Detective]: * * *. Have either one of you been charged with any type of a crime?
>
> [Petitioner]: No.
>
> [Co-defendant]: Not at the present.
>
> [Petitioner]: Not at the present.

(Ex 4 at 16).

Because petitioner's confession was not induced by any promise of immunity, trial counsel was not unreasonable in not moving to suppress the confession on that basis.

b. Petitioner was not prejudiced by counsel's decision not to move to suppress his confession to detectives.

In addition to his belief that a motion to suppress petitioner's confession to detectives would have been fruitless, trial counsel also believed that suppression would not have aided petitioner's case because petitioner had confessed to other witnesses. (App-9). The post-conviction court believed trial counsel's statements in his affidavit. (App-3). Because petitioner's confessions to other witnesses would have been admissible notwithstanding a successful motion to suppress his confession to detectives, petitioner failed to establish that he was prejudiced by any deficiency as to the reasonableness of counsel's decision not to file such a motion.

C. Trial counsel adequately advised petitioner regarding his no-contest plea.

Petitioner reasserts three claims rejected by the post-conviction court: (1) that trial counsel failed to ensure that petitioner's plea was knowingly, voluntarily, and intelligently made; (2) that trial counsel failed to advise petitioner regarding the ramifications of his "no contest" plea; and (3) that trial counsel misadvised petitioner that he would retain his Fifth Amendment privilege against self incrimination upon a plea of no contest. (App Br 29-30). In doing so, petitioner relies only on his own assertions, which the post-conviction court rejected below. The post-conviction court implicitly found that petitioner's assertions were not

PETITIONER'S BRIEF

No. 09-658

In the Supreme Court of the United States

JEFF PREMO, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

RANDY JOSEPH MOORE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. This Court established in *Hill v. Lockhart* the standard for assessing, in a collateral challenge to a conviction that was based on a guilty or no-contest plea, whether an attorney's deficient performance requires reversal of a conviction. In *Arizona v. Fulminante*—a direct appellate review case—this Court reviewed all the evidence presented at trial and held that the erroneous admission of a coerced confession at the trial was not harmless.

a. If a collateral challenge is based on a defense attorney's decision not to move to suppress a confession prior to a guilty or no-contest plea, does the *Fulminante* standard apply, even though no record of a trial is available for review?

b. Even if the *Fulminante* standard applies in that context, is it "clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1)?

2. In Moore's underlying criminal case, he confessed to police that he personally shot the victim. He also confessed to two other people, and he ultimately pleaded no contest to murder. In his collateral challenge to his conviction, he alleged that his attorney should have moved to suppress the confession to police, but he offered no evidence that he would have insisted on going to trial had counsel done so. Did the Ninth Circuit err by granting federal habeas relief on Moore's ineffective-assistance-of-counsel claim?

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C. Moore unsuccessfully petitioned for state post-conviction relief, alleging that his trial attorney should have moved to suppress his confession to police officers. 5

1. Moore confessed to police officers that he shot the victim. 5

2. Counsel's affidavit explained that Moore's previous confession to Raymond Moore and to Debbie Ziegler would have made a motion to suppress "unavailing." 7

3. Counsel advised Moore that a trial likely would result in convictions for murder, assault, and kidnapping. 7

4. Other evidence also indicated that Moore confessed to Raymond Moore and Ziegler before confessing to police 8

5. Moore never affirmatively testified that a motion to suppress would have affected his decision to plead no contest. 10

6. Moore testified that he believed—due to a number of factors—that his no-contest plea was not voluntary 10

7. Moore testified that, at some indistinct point in time, his "worrie[s] about" post-prison supervision and research about "the [b]rightline rule" made him want to withdraw his no contest plea. 11

8. The state post-conviction court denied Moore's petition, concluding—in part—that his trial attorney's conduct did not prejudice him 11

D. Moore unsuccessfully petitioned for federal habeas corpus relief. 13

E. The Ninth Circuit reversed. 14

1. The Ninth Circuit held that the state post-conviction court—by not applying *Fulminante's* direct-review harmless-error standard to Moore's collateral challenge—acted contrary to "clearly established Federal law." 15

2. The Ninth Circuit held that the state post-conviction court also unreasonably applied *Strickland* and *Hill*. 17

F. Judge Berzon concurred, concluding that Moore also was entitled to relief under an alternative prejudice theory 17

G. Judge Bybee dissented. 18

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ARGUMENT 21

A. The Ninth Circuit erred by concluding that *Arizona v. Fulminante*'s direct-review harmless-error holding is "clearly established Federal law" that governs Moore's collateral challenge. 23

1. This Court has never applied *Fulminante's* direct-review harmless-error holding when assessing prejudice under *Strickland* and *Hill*. 26

2. Describing *Fulminante* as controlling is particularly inappropriate because the *state* bore the burden to demonstrate harmlessness in *Fulminante*. 29

3. Applying *Fulminante*'s harmless-error standard to guilty or no-contest pleas violates principles of federalism and creates practical difficulties for reviewing courts. 30

B. The concurrence also failed to apply "clearly established Federal law," and its approach is at odds with Moore's burden of proof. 35

1. Because this Court has never articulated the standard that the concurrence proposed, that standard does not reflect clearly established federal law. 35

2. The concurrence ignored Moore's burden of proof and relied on speculation 37

C. The state post-conviction court reasonably relied on trial counsel's affidavit to rule that Moore failed to prove prejudice under *Strickland* and *Hill*. 39

1. The state court reasonably relied on counsel's description of—and assessment of the significance of—Moore's confession to his brother and to Ziegler. 40

2. Nothing in the record required the state court to find that Moore likely would have gone to trial but for counsel's conduct. 43

a. Nothing required the state court to infer from Moore's deposition testimony that Moore likely would have gone to trial had counsel filed a motion to suppress 44

b. Even if Moore's deposition testimony *must* be read as stating that he would have gone to trial had counsel moved to suppress, nothing required the state court to deem it credible. 48

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OPINIONS BELOW

The district court decision is unpublished. The magistrate judge's findings and recommendations appear in the appendix to the petition for a writ of certiorari. App. 172. The district court order adopting those findings and recommendations is at App. 194, and the district court judgment is at App. 197.

The decision of the United States Court of Appeals for the Ninth Circuit is published at *Moore v. Czerniak*, 574 F.3d 1092 (9th Cir. 2009), and can be found at App. 1.

JURISDICTION

On July 28, 2009, the Ninth Circuit entered its judgment. J.A. 6. On August 3, 2009, the court stayed its mandate for 90 days pending application for a writ of certiorari. J.A. 7. After receiving an extension of time until November 25, 2009, petitioner (hereinafter "the state") filed the certiorari petition on November 24, 2009. J.A. 7. The Court granted the petition on March 22, 2010. J.A. 8.

This Court possesses jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(e)(1) provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

A. Summary

Randy Moore, his stepbrother Lonnie Woolhiser, and a friend kidnapped Kenneth Rogers. After they

drove Rogers to a remote area, Moore shot him in the temple, killing him. Two weeks later, Moore confessed to police. He pleaded no contest to felony murder in Oregon state court.

In a state post-conviction action, Moore claimed that his trial attorney should have moved to suppress the confession to police. The state post-conviction court denied relief, in part because Moore failed to prove that counsel's conduct prejudiced him. The state court relied on counsel's statements that, because Moore confessed to his brother Raymond and to Debbie Ziegler before he confessed to police, and because Raymond Moore and Ziegler could have testified to that effect at trial, even a successful motion to suppress ultimately would have been "unavailing."

Moore subsequently petitioned for federal habeas relief. The district court denied the petition, and the Ninth Circuit reversed. The Ninth Circuit described the state court prejudice ruling as contrary to the "clearly established Federal law" of *Arizona v. Fulminante,* 499 U.S. 279 (1991)—which held that trial court error in admitting evidence of a confession was not "harmless"—and as an "objectively unreasonable application" of the ineffective-assistance-of-counsel standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985).

B. Randy Moore pleaded no contest to murder in state court.

Moore pleaded no contest to murder under Or. Rev. Stat.§163.115, for shooting and killing Kenneth

Rogers with a .22 caliber revolver while committing first-degree kidnapping. App. 209-10, 217, 225-28. Moore entered the plea pursuant to a signed plea petition, "in the expectation that his sentence will be 25 years." App. 217, 221.

At the plea hearing, the prosecutor recounted "what the State's evidence would be," explaining that Moore, Lonnie Woolhiser, and Roy Salyer believed that the victim had stolen belongings from Salyer. App. 222-23. Lonnie Woolhiser is Moore's stepbrother. J.A. 152. On December 7, 1995, Moore, Woolhiser, and Salyer drove to the victim's home. App. 223. Woolhiser entered the home and struck the victim several times in the face. App. 224.

Moore, Woolhiser, and Salyer placed the victim in the trunk of their car, drove to "sort of a canyon area," removed the victim, and walked him up a hill. App. 225-26. At some point, a .22 caliber revolver that Moore had taken from Woolhiser discharged and killed the victim. App. 226-27. "Being a single-action revolver it was necessary for the gun to be cocked in order for it to fire. You could not pull the trigger and sho[o]t the gun without having previously cocked or pulled the hammer back." App. 226. "The bullet entered the left temple, proceeded in a slightly backward and upward direction through the brain and stopped just inside the . . . rear upper right corner of the skull[.]" App. 227. A passerby discovered the victim's body the next day. App. 227.

The trial court imposed a 300-month prison term. App. 1[illegible] Moore appealed his sentence, the Oregon Court of Appeals affirmed the trial court's judgment

without opinion, and the Oregon Supreme Court denied Moore's petition for review. *State v. Moore,* 151 Or. App. 464, 951 P.2d 204 (1997), *rev. denied,* 326 Or. 507, 943 P.2d 395 (1998).

C. Moore unsuccessfully petitioned for state post-conviction relief, alleging that his trial attorney should have moved to suppress his confession to police officers.

Moore challenged his murder conviction by filing a post-conviction petition in state court. An Oregon inmate may obtain post-conviction relief if he proves that his constitutional rights were violated in his criminal proceedings. Or. Rev. Stat. § 138.530(1)(a). The post-conviction petitioner bears the burden of proving the "facts alleged in the petition . . . by a preponderance of the evidence." Or. Rev. Stat. § 138.620. In part, Moore's petition alleged that his trial attorney provided ineffective assistance by failing—before Moore pleaded no contest—to move to suppress Moore's confession to police. App. 199.

The state post-conviction court denied Moore's petition after holding an evidentiary hearing. App. 208. The evidence described below was presented at that hearing.

1. Moore confessed to police officers that he shot the victim.

After the victim's death, Moore and Lonnie Woolhiser asked Moore's brother Raymond "if [he] would take them in" to police, who already were investigating the death. J.A. 153-54. Raymond Moore had previously cooperated with police after killing a man.

J.A. 148-50. Raymond Moore and Debbie Ziegler accompanied Moore and Woolhiser to police. J.A. 23, 153. Officers informed them that they were treating the death as a murder, and that "the other person involved" had already been charged and was in jail. J.A. 23-24. Officers told Moore and Woolhiser that "you haven't been charged with anything," and that "if we arrest you, then you'll be charged." J.A. 23.

Woolhiser told police that "we'd just like to talk to somebody," and Moore said, "As quick as possible, talk to a lawyer." J.A. 26. Officers replied by saying that if formal charges were filed, Moore and Woolhiser could hire an attorney or, if they couldn't afford one, have an attorney appointed. J.A. 26. Officers commented to Moore and Woolhiser that "[we told you that] we would go to bat for you as long as we got the truth." J.A. 29. During the interview, Lonnie Woolhiser explained that he, Moore, and Roy Salyer had driven to the victim's cabin. They slapped the victim, duct-taped him, placed him in the trunk of their vehicle, and drove him to an isolated area. J.A. 51, 56, 64, 68. They then took the victim out of the trunk and walked him "up the hill." J.A. 70.

Moore confessed to police that "when [the victim] got shot I had the gun." J.A. 51. Moore had taken the gun from Woolhiser and "was trying to uncock it when [the victim] slipped and hit and all I know is he dropped." J.A. 51. Moore told police that "[m]y hands were on the trigger." J.A. 70.

2. Counsel's affidavit explained that Moore's previous confession to Raymond Moore and to Debbie Ziegler would have made a motion to suppress "unavailing."

In an affidavit, Moore's attorney stated that he was familiar with Moore's statements to the police, and that he had not moved to suppress evidence of those statements. Counsel explained that "[m]y reasons for doing this were two-fold":

> Mr. Moore had previously given a full confession to his brother Raymond Moore and to a woman named Debbie Ziegler. Mr. Moore and I discussed the possibility of filing a Motion to Suppress and concluded that it would be unavailing, because in the first place, he knew he was not in custody at the time he gave the recorded interview and that the statement was voluntary, and in the second place, he had previously made a full confession to his brother and to M[s.] Ziegler, either one of whom could have been called as a witness at any time to repeat his confession in full detail.

App. 70.

3. Counsel advised Moore that a trial likely would result in convictions for murder, assault, and kidnapping.

Counsel advised Moore that, if he proceeded to trial, he could face an aggravated-murder charge and a potential death penalty. App. 71-

73. Regardless of that possibility, counsel believed that "if we went to trial [Moore] would be found guilty of assault, kidnapping, and murder (as was his codefendant, Roy Salyer, who chose trial as an option)." App. 76. Counsel stated that

> [t]he negotiated plea which we entered into with the district attorney did not include any charges of Measure 11 assault or Measure 11 kidnapping.[1] I thought that it was the best we could do under the circumstances and I told Mr. Moore this. I also made it very clear every time it came up, that the decision of whether to take or to reject a plea offer was entirely Mr. Moore's responsibility.

App. 75-76.

4. Other evidence also indicated that Moore confessed to Raymond Moore and Ziegler before confessing to police.

After Moore informed police that his "hands were on the trigger" when the victim was shot, an officer asked Raymond Moore: "[W]hen they talked to you earlier today . . . they told you this whole story they're telling us now?" J.A. 70, 100. Raymond Moore answered, "Yes sir, they did." J.A. 100. Officers then

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[1] Under "Measure 11," certain crimes—including the first and second-degree forms of kidnapping and assault—are subject to 70-month mandatory minimum prison terms. Or. Rev. Stat. § 137.700.

asked Debbie Ziegler, "Debbie, since you're here and you've listened to this story, when did you first find out about this?" J.A. 100. Ziegler replied, "Today." J.A. 100.

At the post-conviction hearing, Raymond Moore testified that, by the time the police interview began, his "understanding" was that to "put some scare into Mr. Rogers, so he did not do this thing again, [Moore, Woolhiser, and Salyer] had blindfolded him" and "duct taped him and put him in the trunk of the car and took him out to a place that's a little remote." J.A. 156-58. "[W]hile they were pushing Mr. Rogers up the hill, . . . [Moore] had taken the revolver from Lonnie and at the time he had taken it, Mr. Rogers had slipped backwards on the mud and the gun had discharged." J.A. 157-58. Moore and Woolhiser contacted him afterwards and said "they needed to talk to me." J.A. 150. "I dropped everything and got off work and headed right over and I talked to them at Lonnie's house at which time they basically ran down to me the scenario that had occurred and asked me what they should do." J.A. 150. Raymond Moore testified that "I'm not sure of all the exact details because this is basically hearsay," but "[i]t's what was stated in court and it's what they had basically told me after the incident, too, before I took them in, or on the way in." J.A. 158.

Moore also testified at the post-conviction hearing. J.A. 163. He confirmed that he visited his brother Raymond after the crime and before he confessed to police. J.A. 164. He confirmed at the post-conviction hearing that "I took away the gun from Lonnie be-

cause when Lonnie was trying to push [the victim] up the hill, he was staggering and slipped on the mud." J.A. 164. "I took the gun from Lonnie and at that time [the victim] slipped and landed on me and the gun discharged." J.A. 164.

5. Moore never affirmatively testified that a motion to suppress would have affected his decision to plead no contest.

Moore's deposition was taken as part of the post-conviction case, and the deposition transcript was admitted as evidence at the post-conviction hearing. Supp. App. 10. Moore also testified at the post-conviction hearing. J.A. 163. Moore did not affirmatively testify, on either occasion, that a motion to suppress his confession to police would have affected his decision to plead no contest.

6. Moore testified that he believed—due to a number of factors—that his no-contest plea was not voluntary.

Moore's post-conviction petition also alleged that his trial attorney failed to ensure that the no-contest plea was "voluntarily[] and intelligently made." App. 199. At deposition, Moore was asked why believed his plea was not voluntary. Supp. App. 18. He testified that when he entered the plea, he believed he "would not have to testify against my brother [Lonnie Woolhiser] or my co-defendant," that he was "not aware of" certain sentencing possibilities; and that counsel informed him that if he rejected the plea offer both he and Lonnie Woolhiser could face an aggravated murder charge. Supp. App. 18-23.

7. Moore testified that, at some indistinct point in time, his "worrie[s] about" post-prison supervision and research about "the [b]rightline rule" made him want to withdraw his no-contest plea.

Moore's post-conviction petition alleged as well that his trial attorney "coerce[d him] into retaining his plea when he wanted to withdraw his No Contest plea." App. 200. After Moore testified, at deposition, why he believed his plea was not voluntary, the following exchange occurred:

> [STATE'S ATTORNEY:] Why did you want to withdraw your no contest plea?
>
> [MOORE:] Because I was worried about the life post-prison supervision, and at this time I'd started going—by that time I had started going to the legal library in the county and we were reading [b]rightline rule and stuff like that.

Supp. App. 23. When asked "what is the [b]rightline rule," Moore said: "The State said once you ask for an attorney, all questioning must cease." Supp. App. 23. He did not elaborate further about the rule or its significance. *Id.*

8. The state post-conviction court denied Moore's petition, concluding—in part—that his trial attorney's conduct did not prejudice him.

The state post-conviction court denied Moore's petition. It concluded that Moore "did not prove any of

his claims by a preponderance of the evidence," and that Moore "was not denied the right to assistance of counsel . . . articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984)[.]" App. 174.

The state court made a number of "Findings of Fact." It stated that, although Moore alleged that counsel "failed to review the statement he gave to the sheriff's office," "[t]he Court believes trial counsel's affidavit," which "states he read petitioner's statement many times and discussed it in detail with him." App. 201. The state court also made the following additional findings:

> 7. The Court notes that counsel rebutted petitioner's complaint that counsel should have moved to suppress petitioner's confession. Counsel offered two reasons for not filing the motion. (Ex 108, Jordan Aff, p 1.) Counsel asserts it was clear that petitioner was not in custody when he gave his confession, noting that petitioner "never believed that he was in custody and admitted to me that he realized he was not in custody when he and his brothers and another friend voluntarily came to the police department to give the recorded statement." (Ex 108, Jordan Aff, p 12.) Because petitioner was not in custody when he gave his statement, there was no basis for filing a motion to suppress.

> 8. Counsel further explains that he did not move to suppress because petitioner had previously confessed his participation in the crime to his brother (Raymond Moore) and another friend. Both Raymond Moore and the friend could have been called as witnesses to repeat petitioner's confession. (Ex 108, Jordan Aff, p 2.) A motion to suppress would have been fruitless.

App. 204-05.

Moore appealed the post-conviction court's decision. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied Moore's petition for review. *Moore v. Palmateer*, 174 Or. App. 321, 26 P. 3d 191, *rev. denied,* 332 Or. 430, 30 P.3d 1184 (2001).

D. Moore unsuccessfully petitioned for federal habeas corpus relief.

Moore filed a federal habeas corpus petition, alleging, in part, that his trial attorney provided constitutionally ineffective assistance by not moving to suppress Moore's confession to police. App. 173, 184-85.

The district court denied the petition. App. 194-96. The court noted that *Strickland* required Moore to show that counsel performed unreasonably and that counsel's unreasonable conduct "prejudiced the defense," and that "to prove prejudice, a petitioner who has pled no contest to an offense must [show] a reasonable probability that, but for counsel's errors, he would not have entered such a plea and would have

insisted on going to trial." App. 185, *citing Hill v. Lockhart,* 474 U.S. 52, 59 (1985).[2]

The district court concluded that, although "*Miranda* safeguards did not apply to [Moore]'s non-custodial interrogation," Moore's confession was "involuntary" because—after detectives told Moore that they would "go to bat for him"—"[a] reasonable person in [Moore]'s position would have concluded that an offer of leniency had been extended in exchange for a confession." App. 188-90.

However, "even if a suppression motion would have been successful, the suppressed confession would have been redundant," because "the same information could have been introduced at trial through other sources, and [Moore] would have been in no better [position] to proceed to trial." App. 192. Moore failed "to demonstrate that he suffered prejudice since his decision to enter pleas of no contest would not have changed . . . ." App. 192.

E. The Ninth Circuit reversed.

The Ninth Circuit reversed. 534 F.3d 1128 (9th Cir. 2008). After the state petitioned for rehearing and rehearing en banc, the Ninth Circuit denied the petition but withdrew its initial opinion and filed a new majority opinion written by Judge Reinhardt, along with a new concurring opinion and dissenting opin-

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[2] The district court adopted the magistrate judge's findings and recommendations. App. 195. The material quoted in this section is from those findings and recommendations.

ion. App. 2. First, the majority held that counsel performed unreasonably by failing to move to suppress Moore's confession to police. "[T]he confession was impermissibly extracted as the result of a promise of leniency made by the interrogating officers[.]" App. 3. It also "was obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981)," because Moore was "in custody when he was interrogated and confessed," and because, although Moore "asked for counsel before making the confession," officers ignored the request. App. 3, 25 n. 11.

Second, the majority held that counsel's conduct prejudiced Moore. Although the state post-conviction court "concluded that Moore's recorded confession to the police was nonprejudicial because of his prior statements to others," the Ninth Circuit—as detailed below—rejected that conclusion. App. 5.

1. The Ninth Circuit held that the state post-conviction court—by not applying *Fulminante's* direct-review harmless-error standard to Moore's collateral challenge—acted contrary to "clearly established Federal law."

The majority noted that *Strickland v. Washington*, 466 U.S. 668 (1984), is the "clearly established Federal law," under 28 U.S.C. § 2254(d)(1), that generally governs ineffective-assistance-of-counsel claims. App. 18. "In the context of a plea bargain, we specifically ask [under *Strickland*] whether there is a reasonable probability that, but for counsel's deficient performance, the petitioner would have gone to trial rather than accept the plea bargain offered by the state."

App. 19, *citing Hill v. Lockhart,* 474 U.S. 52, 59 (1985)). But "[b]ecause Moore's claim involves the failure to suppress a confession, the prejudice question is governed by [*Arizona v.*] *Fulminante,* 499 U.S. 279 [(1991)], the guiding Supreme Court precedent on the harmlessness of an erroneously admitted confession." App. 19.

The state post-conviction court ruled "that counsel's failure to suppress the formal taped confession was not prejudicial because Moore had previously told his relative and a relative's girlfriend about his participation in the killing of the victim." App. 41. Yet "the Supreme Court squarely rejected a markedly similar argument in *Arizona v. Fulminante,*" a case "that is, *a fortiori,* controlling here." App. 41 (footnote omitted). "*Fulminante* stands for the proposition that the admission of an additional confession ordinarily reinforces and corroborates the others and is therefore prejudicial." App. 43 (footnote omitted).

"Without Moore's formal, taped confession, the state's case would have been far weaker." App. 46. Even assuming that Raymond Moore or Debbie Ziegler "would have testified at trial, it is far from clear what those witnesses would have said or to what extent their testimony would have been persuasive." App. 47-48. "[T]he record falls far short of establishing that the potential testimony of Raymond [Moore] and Ziegler would have been sufficient to cause Moore to accept so harsh a plea agreement[.]" App. 48. Had the confession to police been suppressed, "the state might well have offered a more generous plea bargain." App. 52 n. 26.

In the end, "[w]ithout Moore's confession and the other evidence it produced, Moore likely would not have been convicted of, or even charged with felony murder[.]" App. 52 n. 25. "The state court's finding that a motion to suppress a recorded confession to the police would have been 'fruitless' due to the fact that Raymond [Moore] or Ziegler 'could have been called as witnesses to repeat [Moore's] confession' was without question contrary to clearly established federal law as set forth in *Fulminante*." App. 46 (footnote omitted).

2. The Ninth Circuit held that the state post-conviction court also unreasonably applied *Strickland* and *Hill*.

The majority also held that "the state court's conclusion that counsel's failure to file the motion was not prejudicial . . . constituted an unreasonable application of *Strickland* and *Hill*." App. 20.

F. Judge Berzon concurred, concluding that Moore also was entitled to relief under an alternative prejudice theory.

Judge Berzon concurred "in Judge Reinhardt's discussion of why Moore's counsel's failure to move to suppress his confession prejudiced Moore" under *Hill v. Lockhart*, 474 U.S. 52 (1985). App. 78.

Judge Berzon concluded that Moore also had proved prejudice under an alternative approach: "Under *Kimmelman* [*v. Morrison*, 477 U.S. 365 (1986),] and *Strickland*, the state court could have found prejudice if it were reasonably probable that the failure to file a meritorious motion led to an increase in

jail time for Moore—through, for instance, a loss of plea bargain leverage." App. 78. *Glover v. United States,* 531 U.S. 198, 200 (2001), "held that 'if an increased prison term did flow from an error the petitioner has established *Strickland* prejudice." App. 80. "[I]f Moore can show a 'reasonable probability' that absent his counsel's ineffective performance he would have obtained a verdict leading to less time in prison, then, applying *Strickland* and *Glover,* he has satisfied the prejudice prong." App. 81. Moore merely needed to show "that the plea bargain outcome would have been improved upon by filing" a motion to suppress, and that he "would have been in a better position to negotiate with the prosecutor." App. 84, 90.

G. Judge Bybee dissented.

Judge Bybee dissented, writing that "*Fulminante* does not suggest—let alone *hold*—that Moore was prejudiced because his confession to police was not suppressed." App. 132-33 (emphasis in original). "*Fulminante* concerned the application of harmless error after a trial had taken place, not after a guilty plea had been entered, as here." App. 134. "If we were dealing with a jury verdict, the majority's objection that a 'confession is probably the most probative and damaging evidence that can be admitted against [Moore]' would carry more force because 'it is impossible to know what credit and weight the jury gave to the confession.'" App. 135, *quoting Fulminante,* 499 U.S. at 292 (White, J., dissenting). But because "we are dealing with a plea bargain," the question "is whether a reasonably competent attorney would have advised Moore differently when faced with this evi-

dence, and, if so, whether that would have led Moore to go to trial instead of pleading guilty." App. 135.

Judge Bybee criticized Judge Berzon's focus on whether "the plea bargain outcome would have been improved" had counsel filed a motion to suppress:

> Given the multiplicity of factors that a prosecutor must consider when offering a plea bargain, it is highly doubtful that a federal court, reviewing a state prosecutor's decision to offer a particular plea bargain, even has the tools necessary to decide what bargaining posture a prosecutor would take in the face of a hypothetical motion to suppress.

App. 142. "If the possibility that a more favorable plea bargain might have been offered if a potentially meritorious motion" was filed can prove prejudice, "virtually every plea bargain in the country is now open to habeas relief." App. 148-49.

SUMMARY OF ARGUMENT

Randy Moore pleaded no contest to felony murder in Oregon state court, and a state post-conviction court subsequently rejected Moore's petition for relief. In erroneously holding that Moore is entitled to federal habeas relief, the Ninth Circuit viewed the state post-conviction court judgment through the wrong legal lens, and eschewed the deferential federal habeas lens that Congress has prescribed and that this Court has repeatedly described.

The Ninth Circuit held that Moore's trial attorney provided constitutionally ineffective assistance—under *Strickland v. Washington* and *Hill v. Lockhart*—by failing to move to suppress Moore's confession to police. According to the Ninth Circuit, failure to file the motion affected Moore's plea decision and satisfied the *Strickland / Hill* prejudice standard, even though Moore *also* had confessed to his brother Raymond and to Debbie Ziegler. To reach that conclusion, the Ninth Circuit applied *Arizona v. Fulminante,* which held that the erroneous admission of a confession at trial was not rendered harmless by evidence of a second confession. The Ninth Circuit described *Fulminante* as "controlling," and as "clearly established Federal law" announced by this Court. Yet this Court has never applied *Fulminante's* direct-review harmless-error holding to a collateral review proceeding, has never applied it to a case in which a defendant pleaded guilty or no contest, and has never applied it to assess whether an attorney's conduct prejudiced a defendant under *Strickland* and *Hill*. The Ninth Circuit thus erred by describing *Fulminante* as "clearly established Federal law" in this context.

The Ninth Circuit also erred by describing the state post-conviction court's prejudice ruling as an "unreasonable" application of *Strickland* and *Hill*. At heart, the Ninth Circuit held that the state court could not reasonably rely on the account provided by Moore's trial attorney. According to the attorney's sworn affidavit—which was admitted as evidence at the state post-conviction hearing—Moore's brother and Ziegler each could have testified that Moore gave

a "full" confession, and counsel *and* Moore decided that moving to suppress the confession to police thus would be "unavailing." Nothing in the record required the state court to deem the affidavit not credible (indeed, nothing in the record contradicts the statements described above), or to otherwise disregard it. The state court reasonably relied on it, and it reasonably applied *Strickland* and *Hill*. In ruling otherwise, the Ninth Circuit essentially reviewed the record *de novo*, rather than applying the deferential standard that Congress—and this Court—have mandated. This Court should reverse.

ARGUMENT

The Ninth Circuit purported to assess—as 28 U.S.C. § 2254 requires—whether the state post-conviction court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the [United States] Supreme Court." Yet by concluding that *Arizona v. Fulminante* "control[s]" this case, it applied a legal standard that this Court has never applied to the particular legal context at issue. And rather than viewing the state court's factual determinations in the highly deferential manner prescribed by Congress, the Ninth Circuit viewed the state court's factual determinations *de novo,* and described the record as if the state court had not *already* made dispositive factual determinations that the record allowed it to make.

This Court historically has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in

the integrity of their criminal and collateral proceedings." *Williams v. Taylor,* 529 U.S. 420, 436 (2000). It has long acknowledged the need for "finality" with respect to state court criminal judgments, particularly when convictions are obtained via guilty or no-contest pleas. *See United States v. Timmreck,* 441 U.S. 780, 784 (1979) (noting that "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas," and noting that "the vast majority of criminal convictions result from such pleas"; internal quotes omitted). To further those principles, Congress created a federal habeas review regime that is, at heart, deferential. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)—codified in pertinent part at 28 U.S.C. § 2254—creates a "demanding" standard for obtaining relief. *Miller-El v. Dretke (Miller-El II),* 545 U.S. 231, 240 (2005). AEDPA "placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners." *Miller-El v. Cockrell (Miller-El I),* 537 U.S. 322, 337 (2003). It "imposes a 'highly deferential standard for evaluating state-court rulings.'" *Renico v. Lett,* 559 U.S. ___, 130 S. Ct. 185, 186 (2010), *quoting Lindh v. Murphy,* 521 U.S. 320, 333 n. 7 (1997). It "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett,* 130 S. Ct. at 186, *quoting Woodford v. Visciotti,* 537 U.S. 19, 24 (2002).

Here, however, the Ninth Circuit bypassed the limitations imposed by AEDPA and by this Court's case law.

A. The Ninth Circuit erred by concluding that *Arizona v. Fulminante*'s direct-review harmless-error holding is "clearly established Federal law" that governs Moore's collateral challenge.

Moore needed to show that the state-court judgment denying his post-conviction petition was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result." *Brown v. Payton,* 544 U.S. 133, 141 (2005). "[C]learly established Federal law," as determined by this Court, "refers to the holding, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor,* 529 U.S. at 412.

Strickland v. Washington, 466 U.S. 668, 688, 694 (1984), requires a petitioner who alleges ineffective assistance of counsel under the Sixth Amendment to "show" two things: (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." If a petitioner pleads guilty, he satisfies *Strickland*'s prejudice standard by demonstrating a reasonable probability that, "but for counsel's errors, he would not have pleaded guilty

and would have insisted on going to trial." *Hill v. Lockhart,* 474 U.S. 52, 59 (1985). That same standard logically applies to petitioners who pleaded no contest, because both types of plea reflect a decision to waive trial. *See Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000) ("[l]ike the decision whether to appeal, the decision whether to plead guilty (*i.e.,* waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled"); Or. Rev. Stat. § 135.385(2) (courts accepting a guilty or no-contest plea shall inform the defendant "[t]hat by a plea of guilty or no contest the defendant waives the right . . . [t]o trial by jury," and to rights of confrontation and against self-incrimination).[3]

In this case, the Ninth Circuit engrafted *Fulminante*'s direct-review harmless-error holding onto the *Hill* and *Strickland* prejudice standard, and it erroneously labeled *Fulminante* "clearly established Federal law" for purposes of this case. App. 5, 46. The state post-conviction court ruled "that counsel's failure to suppress the formal taped confession was not prejudicial because Moore had previously told his relative and a relative's girlfriend about his participa-

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[3] Before accepting either a guilty or no-contest plea, a trial court is required by Oregon law to first determine "that the plea is voluntary and intelligently made." Or. Rev. Stat. § 135.390(1). A trial court "shall not enter a judgment" based on a guilty or no-contest plea until it has made "such inquiry as may satisfy the court that there is a factual basis for the plea." Or. Rev. Stat. § 135.395.

tion in the killing of the victim," and because they each could have testified to that effect at trial. App. 41, 205. According to the majority, "the Supreme Court squarely rejected a markedly similar argument in *Arizona v. Fulminante*," a "case that is, *a fortiori*, controlling here." App. 41 (footnote omitted); *see also* App. 19 ("[b]ecause Moore's claim involves the failure to suppress a confession, the prejudice question is governed by *Fulminante*," the "guiding Supreme Court precedent on the harmlessness of an erroneously admitted confession").

Yet this Court has never applied *Fulminante's* direct-review harmless-error holding to a case like this, in which a habeas petitioner asserts—as part of a *collateral* challenge—that his trial attorney's conduct prejudiced him. That the Court has never done so is unsurprising. In *Fulminante*, the *state* bore the burden to show that evidentiary error was harmless, while in this case *Moore* bore the burden to show that his attorney's conduct prejudiced him. Moreover, the harmless-error inquiry in *Fulminante* necessarily required assessment of the other evidence presented at Fulminante's criminal trial, to gauge the effect that an evidentiary error had on the jury. Here, because Moore pleaded no contest, no trial was held, and applying *Fulminante* is unworkable. For each of those reasons, *Fulminante* cannot be described as clearly established Federal law that "control[s]" this case.

1. This Court has never applied *Fulminante's* direct-review harmless-error holding when assessing prejudice under *Strickland* and *Hill*.

In *Fulminante,* a murder defendant's confession to a man named Anthony Sarivola was erroneously admitted at trial. 499 U.S. at 282, 287. On direct review, this Court held that the state "failed to meet its burden of establishing, beyond a reasonable doubt, that the admission of [the] confession . . . was harmless error." 499 U.S. at 297. Although the jury also had learned that Fulminante confessed to Anthony Sarivola's then-fiancée Donna, the Court noted that "[a]bsent the admission at trial of the first confession, the jurors might have found Donna Sarivola's story unbelievable." 499 U.S. at 298. Donna Sarivola claimed the confession "disgusted" her, yet took "no steps to notify authorities," and "claimed that she barely discussed the matter with Anthony Sarivola." *Id.* Moreover, only "some of the details [confessed] to Donna Sarivola" were corroborated by other evidence. 499 U.S. at 299. Because the "reliability of the . . . confession to Donna Sarivola might well have been influenced by the corroborative effect of the erroneously admitted first confession," the state failed to prove that the first confession's admission was harmless. 499 U.S. at 302.

In the Ninth Circuit's view, *Fulminante* compelled the conclusion that had Moore gone to trial, his "formal confession to the police" would have "reinforce[d] and corroborate[d] the informal confessions" he made to Raymond Moore and to Debbie Ziegler. App. 43.

Admission of the confession to police thus "would have been highly prejudicial." App. 43 n. 20. Because the erroneous admission of a confession was not harmless in *Fulminante*, despite the admission of a second confession, the Ninth Circuit held that failure to move to suppress Moore's confession to police necessarily established prejudice under *Strickland*. Yet this Court has never applied *Fulminante's* direct-review harmless-error holding when assessing, on collateral review, whether a trial attorney's deficient performance prejudiced a criminal defendant. And it certainly has never applied *Fulminante's* direct-review harmless-error holding to vacate a conviction that resulted from a guilty or no-contest plea.

The Ninth Circuit thereby erred by describing *Fulminante* as clearly established federal law for purposes of this case. A state court decision is contrary to "clearly established Federal law" only "if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result." *Brown v. Payton*, 544 U.S. at 141. This Court thus has equated "clearly established Federal law" with federal law that the Court has explicitly articulated in circumstances that closely resemble those before the state court.

In *Carey v. Musladin*, 549 U.S. 70, 72 (2006), for example, a habeas petitioner alleged that he was denied a fair trial when courtroom spectators wore buttons depicting the victim. The Ninth Circuit granted habeas relief, describing *Estelle v. Williams*, 425 U.S.

501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), as "clearly established Federal law." *Carey*, 549 U.S. at 74. But because this Court had never previously applied *Williams* or *Flynn* to the type of conduct at issue, it reversed:

> *Given the lack of holdings from this Court* regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law." § 2254(d)(1). *No holding of this Court required the California Court of Appeal to apply the test of Williams and Flynn to the spectators' conduct here.* Therefore, the state court's decision was not contrary to or an unreasonable application of clearly established federal law.

549 U.S. at 77 (emphasis added).

In *Wright v. Van Patten*, 552 U.S. 120, 128 S. Ct. 743, 744 (2008), the Court similarly explained that federal law is "clearly established" only if the Court's case law already provides a "clear answer" to the precise question presented. In *Wright*, the Seventh Circuit held that an attorney provided ineffective assistance at a plea hearing by appearing via speaker phone. The Seventh Circuit described *United States v. Cronic*, 466 U.S. 648 (1984), rather than *Strickland v.*

Washington, as clearly established federal law.[4] 552 U.S. at 121-22. Because "[n]o decision of this Court, however, squarely addresses the issue in this case * * * or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context," this Court reversed. *Wright v. Van Patten*, 552 U.S. at 125. Because "our cases give no clear answer to the question presented, let alone one in Van Patten's favor," no clearly established Federal law supported habeas relief. 552 U.S. at 126.

The Ninth Circuit made essentially the same error that this Court described in *Musladin* and *Van Patten*: It described *Fulminante* as clearly established federal law, even though this Court has never applied *Fulminante* in a collateral proceeding, to a conviction resulting from a guilty or no-contest plea, or to assess prejudice under *Strickland*. The Ninth Circuit's insistence that *Fulminante* reflects "clearly established Federal law" for purposes of this case conflicts with this Court's construction of that phrase.

2. Describing *Fulminante* as controlling is particularly inappropriate because the *state* bore the burden to demonstrate harmlessness in *Fulminante*.

In *Fulminante*, the state bore the burden to show that the erroneous admission of a confession was harmless. *See* 499 U.S. at 297 ("the State has failed to

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[4] In contrast to *Strickland*'s requirement that a petitioner prove prejudice, *Cronic* holds that, in rare circumstances, reviewing courts will presume prejudice. 466 U.S. at 658-60.

meet its burden of establishing, beyond a reasonable doubt, that the admission of Fulminante's confession to Anthony Sarivola was harmless error"). Here, however, *Moore* bore the burden to show that counsel's conduct prejudiced him. In Oregon post-conviction proceedings, the "burden of proof of facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence." Or. Rev. Stat. § 138.620(2). Similarly, "*Strickland* places the burden on the [criminal] defendant, not the State, to show a 'reasonable probability' that the result would have been different." *Wong v. Belmontes*, 558 U.S. ___, 130 S. Ct. 383, 390-91 (2009).

Because *Fulminante* involved a standard of proof that is diametrically opposed to the standard in this case, describing *Fulminante* as ""controlling"—as the Ninth Circuit did—is peculiar at best. *Fulminante* cannot be described as clearly established federal law.

3. Applying *Fulminante*'s harmless-error standard to guilty or no-contest pleas violates principles of federalism and creates practical difficulties for reviewing courts.

Under *Hill v. Lockhart*, Moore had to establish a reasonable probability that, but for his attorney's conduct, he would have gone to trial and rejected the state's plea offer. *Fulminante*, however, requires courts to "review the remainder of the evidence against the defendant" to assess if evidentiary error was harmless. 499 U.S. at 310. Engrafting the *Fulminante* inquiry onto the *Hill* prejudice test ultimately would require the state—to defend Moore's

convictions—to fully litigate his guilt in a collateral proceeding, even though Moore's no-contest plea entitled the state to forgo similar efforts to convict him in the first place. As a result, applying *Fulminante* here would essentially ignore state criminal procedures, while undermining the integrity and finality of state court proceedings. Applying *Fulminante* thus would conflict with principles of federalism that the federal habeas corpus process is designed to respect. It also would create practical difficulties for courts attempting to collaterally review convictions that resulted from guilty or no-contest pleas.

If *Fulminante* applies here, Moore's convictions could be upheld only if the remainder of the state's evidence—once the confession to police is discounted—demonstrates guilt beyond a reasonable doubt. But because Moore pleaded no contest, the record from his initial criminal proceeding does not document the particular evidence that the state could have presented at a trial. As a result, applying *Fulminante* here would require the state to fully litigate Moore's guilt in the state post-conviction proceedings, and to present all the other evidence that it would have presented at a trial. Unless the state did so, the post-conviction court would be unable to conclude that the "remainder of the evidence against" Moore rendered counsel's conduct "harmless" under *Fulminante*.

The majority's approach thereby ignores state procedural rules for accepting a no-contest plea (which authorize a conviction even if the state presents no evidence), and—rather than assuming the integrity

and finality of state-court criminal proceedings—assumes just the opposite. The majority's approach conflicts with AEDPA, and with federalism principles that historically have informed this Court's federal habeas jurisprudence. *See Williams v. Taylor,* 529 U.S. at 436 (noting "AEDPA's purpose to further the principles of . . . finality, and federalism," and that the Court has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings"); *Coleman v. Thompson,* 501 U.S. 722, 726 (1991) ("[t]his is a case about federalism," and "concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus").

Furthermore, if the state—to preclude a *Fulminante*-based grant of habeas relief—must present its case on collateral review, petitioners will be able to obtain relief based on *speculation* about how a failure to suppress evidence might have affected a decision to plead guilty or no contest. That is precisely what occurred in this case. The Ninth Circuit granted relief based on a number of guesses about the effect that suppression of Moore's confession to police *might* have had on the strength of the state's case, on the state's plea offer, and on Moore's decision to plead no contest. *See* App. 48-49 and n. 24 ("Raymond [Moore] would likely have been a hostile witness," and if subpoenaed "it is unlikely that [the state] would have been able to elicit much of the information it desired from him"); App. 52 n. 26 (had confession to police been suppressed, "the state might well have offered a

more generous plea bargain"); App. 48 ("the record falls far short of establishing that the potential testimony of Raymond [Moore] and Ziegler would have been sufficient to cause Moore to accept so harsh a plea agreement"). By vacating Moore's convictions based on speculation, the majority ignored state procedural rules—more particularly, Moore's burden of proof under state post-conviction law—and undermined the integrity of Moore's state-court criminal *and* collateral proceedings.

Moreover, requiring "review [of] the remainder of the evidence against the defendant," in cases in which a defendant pleaded guilty or no-contest, creates practical difficulties for reviewing courts. When a defendant pleads guilty or no-contest, courts conducting collateral review generally will have great difficulty identifying the evidence that *would* have been admitted at trial had part of the state's case been suppressed. And if the state must present its trial case in a collateral proceeding, it often will have to do so years after the defendant pleaded guilty, and while negotiating the inevitable pitfalls—faded memories, missing witnesses, physical evidence that may be difficult to find or re-assemble—that accompany any significant delay between the plea and a collateral-review proceeding.

As a result, and as this Court has acknowledged, attempting a "meaningful and productive evidentiary hearing" to assess how additional rulings on challenged confessions *might* have affected a guilty plea (or an attorney's assessment of a plea offer) is a fool's errand. In *McMann v. Richardson,* 397 U.S. 759, 760

(1970), three federal habeas petitioners claimed that their guilty pleas were "motivated by a prior coerced confession." At the time they entered their pleas, New York law did not permit a trial court judge to exclude evidence of a confession at trial if a *prima facie* case of "voluntariness" had been made. 397 U.S. at 771-72. After the petitioners entered their pleas, this Court—in *Jackson v. Denno,* 378 U.S. 368 (1964)—declared that practice unconstitutional. Nonetheless, the petitioners' allegations that involuntary confessions motivated their pre-*Jackson* pleas did not automatically entitle them to a federal district court hearing or to relief. *McMann,* 397 U.S. at 771. Further, this Court observed that assessing how petitioners' guilty pleas might have been affected, had their understanding of constitutional principles been different at the time, is a speculative and difficult task at best:

> It might be suggested that if *Jackson* [*v. Denno,* 378 U.S. 368 (1964)] had been the law when the pleas in the cases below were made—if the judge had been required to rule on the voluntariness of challenged confessions at a trial—there would have been a better chance of keeping the confessions from the jury and there would have been no guilty pleas. But because of inherent uncertainty in guilty-plea advice, this is a highly speculative matter in any particular case and not an issue promising a meaningful and productive evidentiary hearing long after entry of the guilty plea.

McMann, 397 U.S. at 773-74.

Applying *Fulminante* in this context is at odds with federalism principles, and with the practical realities that accompany entry of guilty or no-contest pleas in state court. Nothing suggests that this Court intended *Fulminante* to apply to cases like this one. *Fulminante* simply cannot be described as clearly established federal law that "controls" this case.

B. The concurrence also failed to apply "clearly established Federal law," and its approach is at odds with Moore's burden of proof.

1. Because this Court has never articulated the standard that the concurrence proposed, that standard does not reflect clearly established federal law.

Although Judge Berzon agreed with the majority's application of *Fulminante* to the *Strickland* prejudice standard, she concluded that Moore also established prejudice under an alternative standard: "Under *Kimmelman* and *Strickland*, the state court could have found prejudice if it were reasonably probable that the failure to file a meritorious motion led to an increase in jail time for Moore—through, for instance, a loss of plea bargain leverage." App. 78. "[I]f Moore can show a 'reasonable probability' that absent his counsel's ineffective performance he would have obtained a verdict leading to less time in prison, then, applying *Strickland* and *Glover* [*v. United States*, 531 U.S. 198, 200 (2001)], he has satisfied the prejudice prong of the ineffective assistance of counsel test." App. 81. Moore merely needed to show that, "but for

counsel's [omission], a defendant would have been in a better position to negotiate with the prosecutor." App. 90.

But this Court has never applied, or articulated, that particular prejudice standard. Although Judge Berzon cited *Hill, Kimmelman,* and *Glover,* she acknowledged that neither *Hill* nor *Kimmelman* "is *directly* on point on its facts, as *Hill* was a different kind of plea bargain case, while *Kimmelman* involved a trial." App. 85 (emphasis in original). And while she described *Glover* as holding "that 'if an increased prison term did flow from an error the petitioner has established *Strickland* prejudice" (App. 80), *Glover* addressed a claim that an attorney provided ineffective assistance at *sentencing*, following a defendant's conviction by a jury. 531 U.S. at 200-01. *Glover* did not address any claim that counsel provided ineffective assistance prior to sentencing, or that counsel's conduct affected a decision to plead guilty or no contest. *Id.* at 199-205.

This Court has never adopted or applied Judge Berzon's alternative prejudice standard. That alternative standard cannot be described as reflecting "clearly established" federal law announced by this Court, and it can provide no basis for vacating Moore's conviction. *See Brown v. Payton,* 544 U.S. at 141 (state court decision is contrary to "clearly established Federal law" if "it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result").

2. The concurrence ignored Moore's burden of proof and relied on speculation.

According to Judge Berzon, Moore would be entitled to relief if he proved that counsel's failure to move to suppress made it reasonably probable that he lost "plea bargain leverage," that the "plea bargain outcome would have been improved," or that he "would have been in a better position to negotiate." App. 78, 84, 90. Judge Berzon further concluded that Moore satisfied that standard. App. 93. In reaching that conclusion, the concurrence essentially ignored Moore's burden of proof, and it relied on speculation instead.

Under Judge Berzon's proposed standard, the question is whether a motion to suppress would have prompted a more favorable plea offer. Yet the record contains no evidence about what the prosecution might have done in response to a successful motion to suppress. Although the record contains an affidavit from the prosecutor, nothing in it suggests that a successful motion to suppress would have altered the state's plea offer. Moore presented no evidence on that topic at all, and he apparently made no effort to elicit evidence along those lines from the prosecutor. And because the record contains no direct evidence about how the prosecutor might have responded to a successful motion to suppress, Judge Berzon's conclusion—that Moore proved prejudice—suggests that a petitioner can prove prejudice based on *speculation* about how the state would have reacted had counsel moved to suppress. That, of course, conflicts with the burden of proof that Oregon law imposes on post-

conviction petitioners, and on the burden that *Strickland* imposes. *See Strickland,* 466 U.S. at 694 (to show prejudice, a defendant must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). For the same reasons, Judge Berzon's approach conflicts with the respect for state court procedural rules that AEDPA embodies, and with Congress's efforts to ensure that federal habeas corpus rulings do not impinge on state court integrity.

Moreover, simply showing that particular conduct would have given Moore increased "leverage" or a "better" bargaining position does not necessarily establish a reasonable probability that a defendant would have rejected a plea offer, or that—in *Strickland*'s terms—the "result of the proceeding would have been different." An attorney who successfully moves to suppress evidence undoubtedly "improves" his client's bargaining position in at least a theoretical or abstract sense. But assessing whether a successful motion makes a defendant more likely to reject a standing plea offer will almost always require additional information. Absent additional information about the strength of the state's case, the prosecutor's willingness to negotiate further, and the defendant's (and his attorney's) view of the case, a court will be hard pressed to find that a successful motion would have influenced the defendant's final decision.

Proof that particular conduct would have resulted in increased "leverage" or a "better" bargaining position does not—by itself—automatically prove that a defendant likely would have rejected a plea offer. As a

result, the concurrence's alternative test effectively dilutes the *Strickland / Hill* prejudice standard. For that reason also, the proposed alternative test cannot be described as clearly established Federal law.

C. The state post-conviction court reasonably relied on trial counsel's affidavit to rule that Moore failed to prove prejudice under *Strickland* and *Hill*.

The Ninth Circuit also described "the state court's conclusion that counsel's failure to file the motion was not prejudicial" as "an unreasonable application of *Strickland* and *Hill*." App. 20; *see* 28 U.S.C. § 2254(d)(1) (authorizing relief is state court decision "involved an unreasonable application" of "clearly established Federal law").[5] But to reach that conclusion, the Ninth Circuit relied on its own *de novo* reading of the record. It did not conduct the deferential review that AEDPA requires. *See* 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct," and habeas corpus applicant "shall have the burden of re-

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[5] *See Brown v. Payton*, 544 U.S. at 141 ("[a] state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner"); *id.* at 143 (2005) (if a decision is "not unreasonable," it "is therefore just the type of decision that AEDPA shields on habeas review,' even if the decision is "incorrect"). *See also Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (explaining that the "unreasonable" standard is a "substantially higher threshold" than the "incorrect" standard).

butting the presumption of correctness by clear and convincing evidence"). It also ignored Moore's burden of proof.

1. The state court reasonably relied on counsel's description of—and assessment of the significance of—Moore's confession to his brother and to Ziegler.

The state post-conviction court concluded that a motion to suppress Moore's confession to police would not have been granted. App. 205. But it also explained that even a *successful* motion could not have assisted Moore in any significant fashion:

> Counsel further explains that he did not move to suppress because petitioner had previously confessed his participation in the crime to his brother (Raymond Moore) and another friend. Both Raymond Moore and the friend could have been called as witnesses to repeat petitioner's confession. (Ex 108, Jordan Aff, p 2.) A motion to suppress would have been fruitless.

App. 205.

In drawing that conclusion, the post-conviction court cited counsel's affidavit. App. 205. In counsel's view, even a successful motion would have been "unavailing," because the state still would have possessed evidence that Moore confessed:

> Mr. Moore had previously given a full confession to his brother Raymond

> Moore and to a woman named Debbie Ziegler. *Mr. Moore and I discussed the possibility of filing a Motion to Suppress and concluded that it would be unavailing*, because in the first place, he knew he was not in custody at the time he gave the recorded interview and that the statement was voluntary, and in the second place, *he had previously made a full confession to his brother and to M[s.] Ziegler, either one of whom could have been called as a witness at any time to repeat his confession in full detail.*

App. 70 (emphasis added).

Counsel's affidavit entitled the state court to find the following: (1) that Moore—before confessing to police—made a "full" confession to Raymond Moore and to Debbie Ziegler; (2) that both Moore's brother and Ziegler could have testified at a trial "to repeat his confession in full detail"; and (3) that, based on those considerations, counsel *and* Moore decided that a motion to suppress would be "unavailing." The rest of the record provided additional—albeit unnecessary—reasons to credit counsel's account. Raymond Moore's post-conviction testimony confirmed that Moore's confession to him matched the confession to police. Raymond Moore testified that by the time he escorted Moore to the police, his "understanding" was that to "put some scare into Mr. Rogers, so he did not do this thing again, [Moore, Woolhiser, and Salyer] had blindfolded" Rogers and "duct taped him and put him in the trunk of the car and took him out to a place

that's a little remote." J.A. 156-58. "[W]hile they were pushing Mr. Rogers up the hill, . . . Randy [Moore] had taken the revolver from Lonnie and at the time he had taken it, Mr. Rogers had slipped backwards on the mud and the gun had discharged." J.A. 157-58. Raymond Moore's "understanding" perfectly corresponds with Moore's confession to police (*see* J.A. 51, 70, containing Moore's confession to police), and the record supports the inference that Raymond's "understanding" derived from the account Moore gave him before confessing to police.

Evidence also corroborates counsel's statement that Moore similarly had confessed to Ziegler. After Moore and Lonnie Woolhiser described their crimes to police, the police asked Raymond Moore whether, "when they talked to you earlier today," Moore and Lonnie Woolhiser "told you this whole story they're telling us now." Raymond Moore replied, "Yes, sir, they did." J.A. 100. Police then asked Ziegler when she "first f[ou]nd about this," and Ziegler answered, "Today." J.A. 100. That supports an inference that Moore gave Ziegler the same account he gave to his brother, and that (as with his brother) he gave that account "earlier today" before the police interview.

Further, nothing in the record contradicts counsel's statement that Raymond Moore and Ziegler could have "repeated [Moore's] confession in full detail" at a trial. The majority surmised that "Raymond would likely have been a hostile witness," and that "even if the state had subpoenaed Raymond to testify," it is "unlikely that it would have been able to elicit much of the information it desired from him."

App. 48-49 and n. 24. Yet Moore presented no evidence that Raymond Moore or Debbie Ziegler would have refused to testify, or that the state would have been unable, at a trial, to elicit a detailed account of Moore's confession to each of them.

Counsel's affidavit entitled the state court to reasonably find that, even if counsel deemed the confession to police suppressible, Raymond Moore and Ziegler could have testified that Moore shot the victim, and that—as a result—counsel *and* Moore would have agreed that a suppression motion would serve no practical purpose.

2. Nothing in the record required the state court to find that Moore likely would have gone to trial but for counsel's conduct.

Although Moore's deposition testimony was entered as evidence, and although Moore testified at the post-conviction hearing, he was never asked how a motion to suppress might have influenced his decision to plead no contest. Supp. App. 10; J.A. 163. He was never asked about the significance that he attributed to his confession to police, or about the relative significance, in his mind, of that confession compared to other evidence of his guilt. Although Moore bore the burden to prove prejudice, he never affirmatively testified that a motion to suppress would have affected his decision to plead no contest.

In response to the state's certiorari petition, Moore argued that his deposition testimony nonetheless "supports the finding that Mr. Moore, if properly advised regarding suppression [of his confession to po-

lice], would not have entered his no contest plea." Br. in Opp. 8. But even if a fact finder reasonably *could* find—based on the deposition testimony—that Moore likely would have gone to trial had counsel moved to suppress the confession, nothing *required* the state post-conviction court to make that finding. First, nothing required the state court to read the deposition testimony as a statement that a motion to suppress would have affected Moore's decision to plead no contest. Second, even if the testimony *must* be read in that manner, nothing required the state court to accept it as credible, or as sufficient to overcome the contrary inference supported by counsel's affidavit.

a. Nothing required the state court to infer from Moore's deposition testimony that Moore likely would have gone to trial had counsel filed a motion to suppress.

AEDPA requires federal courts to assess whether a state court judgment is based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Unless the *only* reasonable inference that the record permits, with respect to Moore's deposition testimony, is the inference urged by Moore, the state court was free to reject that inference. *See Miller-El I*, 545 U.S. at 275 (Thomas, J., dissenting) ("[t]o obtain habeas relief, then, Miller-El must show that, based on the evidence before the Texas state courts, the *only* reasonable conclusion was that prosecutors had racially discriminated against prospective jurors";

emphasis added); *Rice v. Collins*, 546 U.S. 333, 342 (2006) (although "[r]easonable minds reviewing the record might disagree about the prosecutor's credibility," on "habeas review that does not suffice to supersede the trial court's credibility determination"). Here, the record entitled the state court to find that Moore was not stating, in his deposition testimony, that a motion to suppress—by itself—likely would have caused him to go trial.

Moore's response to the state's certiorari petition (Br. in Opp. 7-8) relied on the following exchange, which presumably was prompted by Moore's allegation that counsel "coerc[ed]" him into "retaining his plea when he wanted to withdraw [it]"[6]:

> [STATE'S ATTORNEY:] Why did you want to withdraw your no contest plea?
>
> [MOORE:] Because I was worried about the life post-prison supervision, and at this time I'd started going—by that time I had started going to the legal library in the county and we were reading [b]rightline rule and stuff like that.
>
> Q. And what is the [b]rightline rule?
>
> A. The State said once you ask for an attorney, all questioning must cease.

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[6] *See* App. 200 (quoting post-conviction petition's claim that counsel "coerce[d Moore] into retaining his plea when he wanted to withdraw his No Contest plea").

> Q. And I guess now we're getting into the indictment question. You're saying you didn't voluntarily waive your right to an indictment?
>
> A. Not under all the information that the lawyer had given me at the time—
>
> Q. Did you—
>
> A. –incorrect.
>
> Q. But at the time immediately prior to your plea, you wanted to enter a plea; isn't that correct?
>
> A. Immediately prior to my—yes, under the information that I had been provided at the time by my attorney, I did. Under his advice.

Supp. App. 23.

Nothing in that exchange, however, required the post-conviction court to find that Moore meant to convey that a suppression motion likely would have caused him to go to trial. In his testimony, Moore made no effort to explain the impact that he believed the "[b]rightline" rule could have had on the state's case. And Moore never disputed—either in his deposition testimony or in his post-conviction hearing testimony—counsel's description of the significance that *they both attached* to Moore's confession to his brother and to Ziegler. If Moore intended to testify that a motion to suppress would have affected his decision to plead no contest, he could have—and should have—done so, as the first step toward meeting his

burden to prove that counsel's conduct prejudiced him.

Moreover, the state court was entitled to find, based on the rest of Moore's deposition testimony, that any dissatisfaction with the plea was not the result of a new understanding of the law governing confessions, but of dissatisfaction with information he received—before entering the plea—about the plea's consequences. Immediately before the exchange quoted above, Moore was asked about his claim that the plea was not voluntary. Supp. App. 18. Moore then described a number of ways in which he believed that counsel and the state had misinformed him about the plea's consequences. He testified that when he entered his plea, he was told he "would not have to testify against my brother or my co-defendant"[7]; that he was not informed about certain sentencing consequences; and that counsel informed him that if he rejected the plea offer, he and Lonnie Woolhiser could face an aggravated murder charge. Supp. App. 18-22. That testimony entitled the state court to find that the potential admissibility of the confession to police did not—compared to other factors—play a *constitutionally significant role* in Moore's decision to plead no contest.

Even if one permissible way to view Moore's testimony is as an assertion that he would have gone to trial had counsel filed a motion to suppress, the state

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[7] As Moore acknowledged, he ultimately was not required to testify against either one, and he ultimately did not testify against either one. Supp. App. 20.

post-conviction court was not required to draw that inference. Indeed, evidence in the record supports the contrary inference. As a result, the state court judgment cannot be deemed "unreasonable," or as requiring federal habeas relief.

b. Even if Moore's deposition testimony *must* be read as stating that he would have gone to trial had counsel moved to suppress, nothing required the state court to deem it credible.

Even if Moore had affirmatively testified, at deposition, that filing a motion to suppress would have prompted him to go to trial, the record entitled the state post-conviction court to deem that testimony not credible. For that reason also, nothing required the state court to conclude that Moore proved prejudice under *Strickland* and *Hill*.

First, any testimony from Moore that a suppression motion would have affected his decision to plead no contest would have conflicted with counsel's statement that, because Moore had confessed to his brother and to Ziegler, counsel *and Moore* concluded that a motion to suppress would be "unavailing." App. 70. The court was entitled to rely on counsel's statements to deem any contrary testimony—testimony suggesting Moore did *not* consider the confession to his brother or Ziegler particularly significant—not credible.[8]

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[8] In addition, because the state court observed Moore testify at the post-conviction hearing, it was entitled to rely on Moore's demeanor to assess his general credibility.

Second, nothing required the state court to find that a motion to suppress, even if successful, would have altered counsel's advice to Moore. Counsel's advice often strongly influences a defendant's decision to accept or reject a plea offer. *See Hill,* 474 U.S. at 59 (if counsel's alleged error "is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea"). In this case, even had the confession to police been suppressed, counsel's advice would not have changed. As the Ninth Circuit remarked, "counsel's affidavit make[s] clear that his decision regarding the motion to suppress was unrelated to his subsequent plea negotiations." App. 33. That affidavit undoubtedly supports the following inference: Moore's attorney believed that, even without the confession to police, an aggravated murder charge was a possibility, and that a trial likely would produce—at the least—murder, kidnapping, and assault convictions. App. 70-77. A motion to suppress was unlikely to alter counsel's advice. That further un-

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See Uttecht v. Brown, 551 U.S. 1, 9 (2007) (in reviewing federal habeas challenge to state court rulings concerning jurors' ability to follow instructions, "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire"). To the extent that the state court implicitly deemed Moore's testimony not credible, that determination warrants deference.

dermines any assertion that a suppression motion would have prompted Moore to go to trial.

Third, Moore presented no evidence that the state would have made a more generous plea offer had the confession to police been suppressed. Even without that confession, the state still possessed evidence that Moore had confessed to his brother and to Ziegler. Moreover, nothing suggests that Moore, in confessing to his brother, exaggerated his culpability. Moore confessed to his brother not to "impress" him, but because he recognized the seriousness of his situation, and because he knew that his brother had once been in a similar situation. *See* J.A. 148-50 (containing Raymond Moore's testimony that Moore and Woolhiser said "they needed to talk to me," that they "ran down to me the scenario that had occurred and asked me what they should do," and that Raymond had previously cooperated with police after killing a man). And Moore presented no evidence that, had Raymond Moore and Ziegler testified at trial, Moore could have somehow impeached their testimony.

The state had no reason to believe that, even if the confession to police was suppressed, it would have trouble proving some form of murder. Not only had Moore admitted shooting the victim in his confession to Randy Moore and to Ziegler, the victim had been shot in the temple, with a gun that had to be cocked before it would fire. App. 226-27. Even if the state could not prove that Moore committed aggravated murder by killing the victim intentionally and personally (*see* Or. Rev. Stat. § 163.095(2)(d), providing that murder constitutes aggravated murder if com-

mitted personally and intentionally), it would not have had difficulty proving that Moore committed, at the least, the felony murder that he pleaded no contest to. *See State v. Blair*, 348 Or. 72, 74, 228 P.3d 564 (2010) (proof of felony murder under Oregon law does not require proof of intent to cause the victim's death); Or. Rev. Stat. § 163.115(1)(b) (murder includes an unintentional killing committed during commission of, or flight from, first-degree kidnapping). Nothing suggests that suppression of Moore's confession to police would have affected the state's assessment of its prospects at a trial, or the offer it made to Moore.

Nothing required the state post-conviction court to find that, had a motion to suppress been filed, either counsel's advice or the state's offer would have changed. Consequently, even if Moore testified that a motion would have affected his decision to plead no contest, the state court was entitled to disbelieve him.

Ultimately, the Ninth Circuit erred by failing to put Moore to his burden of proving that, had counsel filed a motion to suppress, he would have gone to trial. The Ninth Circuit instead turned the *Strickland/Hill* prejudice standard on its head, by requiring the *state* to prove that, had counsel moved to suppress, Moore *would* have taken the state's plea offer, rather than requiring Moore to prove that he would not have taken it. *See* App. 48 (containing Ninth Circuit's statement that "the record falls far short of establishing that the potential testimony of Raymond and Ziegler would have been sufficient to cause

Moore to accept so harsh a plea agreement"). This Court should reverse.

CONCLUSION

The Ninth Circuit erroneously described *Fulminante's* direct-review harmless-error holding as "clearly established Federal law" that controls this collateral-review case. It also erred by holding that the state post-conviction court—in denying Moore's post-conviction petition—unreasonably applied the *Strickland / Hill* prejudice standard. The state post-conviction court reasonably relied on the record before it, and nothing in that record required the court to find that Moore proved the requisite prejudice. This Court should reverse the Ninth Circuit judgment, and should affirm the district court judgment denying Moore's petition for federal habeas relief.

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RESPONDENT'S BRIEF

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No. 09-658

In The Supreme Court of The United States

JEFF PREMO, SUPERINTENDENT,
OREGON STATE PENITENTIARY,
Petitioner,

v.

RANDY JOSEPH MOORE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

This is a federal habeas corpus case in which the petitioner pleaded *nolo contendere* in state court. He challenges his conviction based on his trial attorney's failure to file a meritorious motion to suppress his tape-recorded confession to police. In such cases, the test for ineffectiveness is drawn from *Strickland v. Washington, Hill v. Lockhart*, and *Kimmelman v. Morrison*. The questions presented are:

1. When Mr. Moore's attorney failed to seek suppression of a tape-recorded statement that was induced by a promise of leniency by police, whether this case involves an ordinary application of *Strickland*, *Hill*, and *Kimmelman* by the Court of Appeals in its reliance upon *Arizona v. Fulminante* as substantive law relevant to assessments of whether Mr. Moore's attorney's performance fell below an objective standard of reasonableness and whether Mr. Moore was prejudiced as a result.

2. When the state post-conviction court ruled that Mr. Moore's attorney acted competently because the motion to suppress had no merit and suppression would, in any event, have been fruitless because of the availability of two other confessions, that court neither cited *Hill* nor *Kimmelman*, and the State did not contest the conclusion of the district court that Mr. Moore's confession was unconstitutionally obtained,

whether the Court of Appeals properly focused its analysis of effectiveness and prejudice on the significantly greater value to the prosecution of multiple confessions and tape-recorded confessions to police officers as contrasted with oral confessions to civilians.

3. When the state courts never referenced *Hill* or its analysis, whether the Court of Appeals properly assessed the record and its conclusion that Mr. Moore would not have entered a plea of no contest in the absence of his attorney's failings, is incorrect and should be reversed by this Court.

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STATEMENT OF THE CASE

During the investigation of a homicide, police took and tape-recorded a confession from Randy Moore. The federal district court found that the confession was unconstitutionally obtained because it was improperly induced by a police promise of leniency. The State did not appeal that determination, a fact that all three judges of the Court of Appeals considered to be a concession of its inadmissibility. Notwithstanding the clarity of the issue, Mr. Moore's attorney not only failed to seek suppression of the statement, but did not understand the meritorious basis for such a motion.

Mr. Moore was reluctant to plead guilty and, indeed, he did not. Instead, he pled ***nolo contendere*** to felony murder. JA 9. After sentencing, Mr. Moore independently researched the law related to the admissibility of the confession and discovered that a confession could be suppressed based on a suspect's invocation of the right to counsel, a separate ground on which the Court of Appeals believed that suppression was warranted. App. 25 n.11. He filed for post-conviction relief in an effort to overturn his *nolo* plea.

In the state system and later in federal habeas, the State argued that relief should be denied because the availability of informal confessions to two civilians rendered the inadmissibility of the confession to police irrelevant. In responding to the State's argument, the Court of Appeals relied upon

Arizona v. Fulminante, 499 U.S. 279 (1991), in its assessment of Mr. Moore's attorney's competence and in determining whether failure to file the motion to suppress increased the likelihood that Mr. Moore would have gone to trial in the absence of his attorney's mistake.

The Facts Of The Crime And Mr. Moore's Plea Of *Nolo Contendere*.

Randy Moore killed his friend Kenneth Rogers in a shooting incident on a muddy hillside in Southern Oregon. JA 51, 67, 98 & App. 226-27. As the prosecutor stated at Mr. Moore's sentencing, after Rogers had burglarized the home of a mutual friend, Moore and several other men "were going to take [Rogers] out into the woods, release him and let him walk home, basically, to put the fear of God in him at least." Supp. App. at 4. While walking up the hill, one of the other men fell in the mud. JA 164. Mr. Moore took the gun. JA 52, 78, 164. Shortly after, Rogers slipped and fell into Mr. Moore and the gun discharged, killing Rogers. JA 51-52, 78, 119; App. 227.

The trial judge who sentenced Mr. Moore recognized that the case "has got several tragedies within it . . . [t]he tragedy here is this was a person that was apparently a friend of yours . . . you have been able to live in the community . . . pretty much crime free . . . [t]he thing just got out of hand." Supp. App. at 8-9.

Two days after the shooting, Mr. Moore went to the police station with his half-brother, Lonnie Woolhiser (the man who fell first on the hill), his brother, Raymond, and his half-brother's girlfriend, Debbie Zeigler. Either on the ride or before, Mr. Moore told Raymond and Zeigler something about the incident. JA 100, 150, 158. When questioned by the police, Mr. Moore placed himself at the scene, admitted his participation in taking Rogers to the hill, and described the shooting accident. JA 51-86. This tape-recorded statement was obtained through promises of leniency and after the police ignored Mr. Moore's request for counsel. JA 29-30; App. 14, 24-25.

Mr. Moore's attorney failed to recognize that the police had unconstitutionally obtained the statement and did not move for its suppression. App. 70.

Shortly after entering his plea of *nolo contendere*. Mr. Moore decided to seek to withdraw it, but was talked out of those efforts. Supp. App. 21.

The State Post-Conviction Proceedings.

Once in prison, Mr. Moore continued to question the wisdom of his plea and sought to have the judgment vacated through the state post-conviction process. As he explained in the deposition he gave for that court, two primary factors motivated his decision to seek relief. Of importance to this proceeding, one was his research on the "bright line"

rule involving confessions and invocation of the right to counsel. Supp. App. 23.

The post-conviction petition filed by Mr. Moore asserted that his attorney had failed him in at least twelve ways. Claims 1 (a) and (b) focused on his attorney's failure to seek suppression of the tape-recorded statement taken from him by the police.[1] The other claims included his attorney's failure to investigate, inadequate advice on the consequences of any plea, and coercion of the plea.

Both parties had ample opportunity to litigate the matter in the state system. The State obtained affidavits from Mr. Moore's trial and appellate attorneys and the prosecutor, deposed Mr. Moore, and was able to question both Mr. Moore and his brother, Raymond Moore, at the post-conviction trial.

The testimony revealed that both Raymond and Ms. Ziegler were allowed by the police to be present during their interrogation of Mr. Moore.[2] JA 23, 159.

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[1] Mr. Moore's claims were articulated as ten claims in his amended petition with claims 1 and 2 focusing on his attorney's failure to seek suppression. App. 199-200.

[2] Mr. Moore's half-brother and co-defendant, Lonnie Woolhiser, was also present during the interview. The fact that Raymond Moore and Ms. Zeigler were present during the interrogation when the confession was unlawfully obtained would have necessitated a taint hearing to determine what they had previously heard concerning the crime and to ensure that

Mr. Moore's attorney described them as having heard "full confessions" from Mr. Moore, and the state post-conviction court adopted that testimony as a fact. App. 70, 205. Transcripts of the interrogation, deposition, and post-conviction trial testimony do not, however, reveal what each knew before they heard Mr. Moore's confession to the police. As Ms. Ziegler told the police, "I still didn't know the actual thing." JA 130. As Raymond Moore told the post-conviction court, "I'm not sure of all the exact details because this is basically hearsay." JA 158.

In his deposition, Mr. Moore explained his research on the confession and how his attorney's failure to understand or advise him of the law affected his decision to plead *nolo contendere*:

> *Q. Why did you want to withdraw your no contest plea?*
>
> *A. Because* I was worried about the life post-prison supervision, and at this time I'd started going – ***by that time I had started going to the legal library in the county and we were reading Brightline rule and stuff like that.***
>
> Q. And what is the Brightline rule?

---

they did not testify to what they had learned during the interrogation.

A. The State said *once you ask for an attorney, all questioning must cease.*

. . .

Q. But at the time immediately prior to your plea, you wanted to enter a plea; isn't that correct.

A. Immediately prior to my – yes, under the information that I had been provided at the time by my attorney, I did. *Under his advice.*

Supp. App. 23 (emphasis added).

Mr. Moore's trial attorney separately addressed each of the claims about his performance in his affidavit. In paragraphs 3 and 4, he responded to the claim that he was ineffective when he failed to seek suppression of the tape-recorded statement, explicitly articulating two reasons for his decision: "My reasons for doing this were two-fold." App. 70. They were (1) his belief that the statement was taken lawfully and (2) his belief that a motion to suppress would have been pointless because the State had available the confessions Mr. Moore had made to his brother and his half-brother's girlfriend. App. 70. The affidavit addressed both the assertion of the right to counsel and the voluntariness of the confession. App. 70. The State not only obtained the affidavit from Mr. Moore's counsel, but typed it on its pleading paper.

In its post-conviction trial memorandum, the State responded separately to all of Mr. Moore's claims of ineffectiveness. With respect to the claim related to the failure to file a motion to suppress, the State relied solely on the statements by the attorney, arguing to the post-conviction court that Mr. Moore should not be granted relief because his attorney's statements "rebut petitioner's complaint." JA 139. The State then recited counsel's view of the admissibility of the statement and his belief that a "motion to suppress would have been fruitless" because of the confessions to the two other people. JA 139-40. The State concluded:

> [w]ithout sufficient evidence to establish counsel's alleged error had a tendency to affect the outcome of his case, his request for post-conviction relief should be denied.

JA 140.

The state post-conviction court took the same approach in its Findings of Fact, Conclusions of Law, a document prepared for the court by the State. JA 176. Paragraphs 7 and 8 of the court's findings track paragraphs 3 and 4 of counsel's affidavit and adopt portions of the State's memorandum word-for-word. JA 139-40; App. 70, 204-05. The state court also found Mr. Moore was not in custody when the police took the statement from him so that any assertion of the right to counsel had no impact on the admissibility of the statement. App. 201-02.

The state court denied relief, concluding that Mr. Moore was not denied his right to the assistance of counsel as guaranteed by the United States Constitution and as articulated by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). App. at 206. Although Mr. Moore's case involved a plea, on the question of prejudice, neither the State nor the post-conviction court cited *Hill v. Lockhart*, 474 U.S. 52 (1985), nor engaged in the analysis it requires on any of the claims raised by Mr. Moore. JA 137-40; App. 198-207.

When Mr. Moore turned to the federal court, he raised the same claims as he had in the state post-conviction proceedings. His attorney narrowed the focus to the claim of ineffectiveness involving the motion to suppress. App. 184. The district court agreed with the state court that Mr. Moore was not in custody so that the failure to honor his request for counsel did not require suppression. App. 188. The court concluded, however, that the police had taken the recorded statement through an improper promise of leniency. App. 189-90. Nonetheless, the court found that the presence of the other statements in the case meant that Mr. Moore was not prejudiced by his attorney's failings. App. 192.

On appeal, the State argued the in-custody issue but did not challenge the conclusion of the district court that the statements were unlawfully induced by a promise of leniency. Resp. Br. at 17-18. When it turned to the prejudice question, the State limited its argument, as it had in the state post-conviction

court, to the assertion that the availability of the statements to Mr. Moore's brother and the half-brother's girlfriend rendered a motion to suppress "fruitless." Resp. Br. at 15-16, 19-20. While the State recited the paragraphs of the affidavit of Mr. Moore's trial counsel that discussed his opinion on the value of the plea offer (Resp. Br. at 15-16), that discussion did not address the defective advice with respect to the inadmissibility of the confession.

SUMMARY OF ARGUMENT

This is the rare case in which the State does not contest the fact that a confession tape-recorded by the police was obtained unconstitutionally. Mr. Moore's lawyer failed to understand that a motion to suppress that confession had merit.

Mr. Moore entered a plea of *nolo contendere* based on the advice of his counsel, including incorrect advice about the admissibility of the tape-recorded statement. After sentencing, when he learned that his attorney had viable grounds on which to seek suppression of the tape-recorded statement, Mr. Moore sought to have his conviction set aside. The facts fully support his contention that he would not have entered a plea of *nolo contendere* if he had been properly advised.

In its response to Mr. Moore's challenge to his conviction in state post-conviction proceedings on the ground that his attorney had failed him when he did not seek suppression of the tape-recorded confession,

the State had ample opportunity to present evidence and argue why the attorney's performance was not deficient. However, the State only presented two arguments: (1) a motion to suppress would have been denied; and (2) even if the motion were granted, filing it would have been "fruitless" because Mr. Moore had also confessed to his brother and his half-brother's girlfriend.

The State similarly limited its argument in the habeas proceedings in the federal courts. On appeal, the State did not contest the conclusion of the district court that the statement was taken in violation of Mr. Moore's constitutional rights.

There is no disagreement in this case that *Strickland* and *Hill* establish the governing standard. The two-prong standard set out in *Strickland* for assessing claims of ineffectiveness of counsel requires a determination of whether counsel's performance fell below an objective standard of reasonableness and, if so, whether the defendant was prejudiced as a result. *Strickland,* 466 U.S. at 687-88. If a case resolves on a plea, the prejudice inquiry turns on whether the defendant would have pleaded guilty in the absence of his counsel's failing. *Hill,* 474 U.S. at 58. When the alleged ineffectiveness involves an attorney's failure to file a motion to suppress, the inquiry on both prongs requires assessment of the substantive merits of the motion. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

The decision of the Court of Appeals followed the dictates of this Court in *Strickland*, *Hill*, and *Kimmelman*. The Court of Appeals began its analysis by setting out the standards articulated in *Strickland* and *Hill*. It then accepted the State's concession regarding the inadmissibility of the confession to the police. It did not conclude that the fact of inadmissibility necessarily rendered counsel's performance constitutionally defective but instead turned to an analysis of counsel's performance. From this point on, the opinion addressed the issues raised by the State.

In its response to the State's assertions, the Court of Appeals properly considered the teaching of *Fulminante*. *Fulminante*'s discussion of the probative value of confessions and the extent of damage from multiple confessions fully supports the Circuit's conclusion that there was a reasonable probability that Mr. Moore would not have entered a plea if he had been properly advised. It was also proper for the Court of Appeals to consider the greater impact a tape-recorded confession taken by police, compared to an oral account to Mr. Moore's brother and friend, would likely have had on a jury.

The federal courts are free to consider the outcome question required by *Hill* without deferring to the state court because that court did not engage in the analysis required by *Hill* in reaching its decision.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE AEDPA'S STANDARD OF REVIEW AND THIS COURT'S WELL ESTABLISHED PRECEDENTS OF *STRICKLAND*, *HILL*, AND *KIMMELMAN* IN GRANTING HABEAS CORPUS RELIEF.

A. In A Plea Case, Under *Strickland*, *Hill*, And *Kimmelman*, Analysis Of Counsel's Alleged Ineffectiveness In Failing To File A Motion Requires Assessment Of The Merits Of The Motion.

In *Strickland*, the Court established the two-prong standard for assessing claims of ineffectiveness of counsel. First, the courts are required to determine whether counsel's performance fell within the range of reasonable professional assistance. 466 U.S. at 689. Second, if counsel's performance fell below that standard, the courts are to determine whether the defendant was prejudiced as a result, that is, whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The ultimate inquiry is whether there "is a probability sufficient to undermine confidence in the outcome." *Id.*

In *Hill*, the Court held that *Strickland* applies to cases in which judgment is entered following a plea

of guilty rather than a trial.[3] Accordingly, Sixth Amendment standards govern counsel's representation during the plea process. *Hill*, 474 U.S. at 57. This past term, the Court reiterated "we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010); *see also Iowa v. Tovar*, 541 U.S. 77, 81 (2004) ("The entry of a guilty plea . . . ranks as a 'critical stage' at which the right to counsel adheres.") (citing *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972), and *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam)).

In plea cases, *Strickland*'s performance inquiry is the same and the prejudice inquiry turns on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. This assessment often requires prediction of potential outcomes at trial based on the evidence that was available to the prosecution and that which might have been discovered had counsel performed effectively. *Id.* at

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[3] The *Hill* standard applies whether the plea was guilty or *nolo contendere*. *See, e.g., Carter v. Collins*, 918 F.2d 1198, 1200 n.1 (5th Cir. 1990) (citing *Hudson v. United States*, 272 U.S. 451 (1926) and *Norman v. McCotter*, 765 F.2d 504, 509-11 (5th Cir. 1985)); *see also Slicker v. Wainwright*, 809 F.2d 768, 768 (11th Cir. 1987) (remanding "for the district court to apply the teachings of *Hill v. Lockhart* . . . to the appellant' s claim that his *nolo contendere* pleas resulted from incorrect advice from his lawyer").

59-60. As this discussion makes clear, the fact that plea bargaining takes place in the shadow of a trial is inherent in the analysis required under *Hill*.

When an attorney's alleged ineffectiveness involves failure to file a motion to suppress, the inquiry on both prongs requires assessment of the merits of the motion. *Kimmelman*, 477 U.S. at 375. In *Kimmelman*, this Court found that trial counsel performed deficiently when he failed to make a timely and meritorious motion to suppress physical evidence that was seized in violation of his client's rights under the Fourth Amendment.

Although *Kimmelman* arose following a trial, its conclusion that the prejudice inquiry includes assessment of the viability of the motion is equally applicable following a plea. As explained in *Hill*, "the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Hill*, 474 U.S. at 59; *see, e.g.*, *Gilbert v. Merchant*, 488 F.3d 780, 795 (7th Cir. 2007) ("Gilbert's case for prejudice presumes that his confession would have been suppressed on his counsel's motion and that this would have so weakened the State's case that he likely would not have pleaded guilty. The [state court's] reasonable determination that his confession was voluntary precludes him from establishing prejudice in this way."). *Kimmelman*'s assessment that a reviewing court cannot determine whether an attorney was ineffective or the effect of his failings without first

assessing the substantive law that is at issue and the facts of the case is consistent with the general body of habeas law.

In assessing an ineffective assistance of counsel claim in habeas corpus, the courts are required to identify the clearly established law for several different purposes. First, it is necessary to identify the relevant law on the question of the attorney's performance. In some cases, for example, whether an attorney's failure to investigate rendered his performance deficient, *Strickland* itself will be the clearly established law. 466 U.S. at 690-91. In other cases, the question of effectiveness may be decided by considering whether an attorney failed to understand the criminal law as defined by the state supreme court. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 395 (2000) (finding trial counsel ineffective in failing to investigate available mitigation evidence from state juvenile records for use in capital sentencing; counsel "incorrectly thought that state law barred access to such records"); *Young v. Dretke*, 356 F.3d 616 (5th Cir. 2004) (finding counsel ineffective based on his failure to move to dismiss untimely indictment on state law grounds). In that type of circumstance, the clearly established federal law is *Strickland*, but the case cannot be decided without reference to the relevant substantive state law.

In other circumstances, the clearly established law may be a combination of *Strickland* and other Supreme Court precedent. For example, if the issue

is whether an attorney was ineffective because he failed to object to racially discriminatory strikes by a prosecutor in voir dire, *Batson v. Kentucky*, 476 U.S. 79 (1986), is part of the *Strickland* analysis.

After identifying the law relevant to the effectiveness of the attorney's performance, the court must apply it to the facts of the case. In this stage, the reviewing court must consider whether counsel should have considered taking, or should have taken, a particular action.

The same analysis is required on the prejudice prong. As a general proposition, the clearly established federal law with respect to prejudice is *Strickland*. In the plea context, it is both *Strickland* and *Hill*. In assessing prejudice, as with the assessment of performance, it may also be necessary to look to other bodies of law. *See, e.g.*, *Williams*, 529 U.S. at 398 (in prejudice analysis, Court, *inter alia*, relied on Eighth Amendment decision in *Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1990)); *Williamson v. Ward*, 110 F.3d 1508, 1520 (10th Cir. 1997) (finding trial counsel ineffective for failing to investigate petitioner's history of mental illness; in prejudice analysis, court cited *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), regarding effect of petitioner's mental illness); *Luchenburg v. Smith*, 79 F.3d 388, 391 (4th Cir. 1996) (counsel ineffective in failing to request a key jury instruction; court cited, *inter alia, Cupp v. Naughten*, 414 U.S. 141, 147 (1973), in determining basis for relief); *Miller v. Webb*, 385 F.3d 666, 676-77 (6th Cir. 2004) (finding

counsel ineffective based on failure to challenge juror for cause; for prejudice, court looked to Sixth Amendment impartial jury cases to find presumption of prejudice); *Davis v. Sec'y for Dept. of Corrections*, 341 F.3d 1310, 1317 (11th Cir. 2003) (counsel ineffective for failing to renew *Batson* claim before accepting jury; for prejudice, court reviewed decisions on the discriminatory exercise of peremptory challenges to find harmless error analysis inapplicable).

B. The Court of Appeals Properly Applied *Strickland*, *Hill*, And *Kimmelman*.

The Court of Appeals understood and followed *Strickland*, *Hill*, and *Kimmelman*. At the outset of its discussion, the court stated: "The substantive federal law guiding our inquiry is supplied by *Strickland* . . . ." App. at 18. The court then articulated the *Hill* standard for prejudice in a plea case. App. at 19; *see also* App. at 46, 52 n.26.

After citing *Strickland* and *Hill*, the Court of Appeals engaged in the required assessment of the relevant law on the admissibility of statements. App. at 23-38. It could not properly have done so in the circumstances of this case without analyzing the merits of the foregone motion to suppress under established precedent. The Court of Appeals concluded that the statement was inadmissible both because, as the State conceded, it was involuntary and because it was taken in violation of Mr. Moore's right to counsel. App. at 24-25.

Once it concluded that the statement was taken in violation of the Constitution, the Court of Appeals considered the reasons offered for counsel's failure to file the motion. App. 26. It then turned to the question of prejudice from counsel's failing under the *Strickland/Hill* standard. App. at 38. Under that standard, the Court of Appeals was required to assess the extent of the harm from the failure to file the meritorious suppression motion and it did. App. 38-51.

At the conclusion of the required analysis of the substantive law, the Court of Appeals properly turned back to *Strickland/Hill* and held:

> There is at least a reasonable probability that, had his confession to the police been suppressed, Moore would have insisted on going to trial rather than pleading to the offense to which he did . . . In light of these considerations, the only reasonable conclusion is that Moore has established *Strickland* prejudice.

App. at 51-52.

In its analysis, the State ignores several critical points. First, the State ignores the fact that *Strickland*'s ineffectiveness inquiry requires analysis of the substantive law relevant to such a claim. Second, the State ignores the directive in *Hill* that analysis of prejudice will often require the courts to assess the effects of the substantive error on the

facts of the case before turning to a prediction of whether there is a probability that the error would have changed the outcome. *Hill*, 474 U.S. at 59. The State then disregards the fact that the Court of Appeals' discussions of ***Fulminante*** occurred in the manner dictated by this Court's precedents.

The first full discussion of ***Fulminante*** appears in the court's analysis of the performance prong of *Strickland*. The court recognized that failure to file a motion is not ***per se*** ineffectiveness requiring relief. App. 21-22. The courts are, rather, required to determine the importance of counsel's failure to file the motion within the context of the case. It was only because the Court of Appeals found Mr. Moore's taped confession "highly damaging" and counsel's reasons for not filing the motion wanting that the court concluded that the State court's determination that Mr. Moore received the effective assistance of counsel "was contrary to ***Fulminante*** and an unreasonable application of *Strickland*." App. 22. The majority returned to this point later in the opinion, reiterating that the failure to file the motion fell below an objective standard of reasonableness because counsel had failed to properly assess the damaging nature of the confession under ***Fulminante***. App. 27.

The proper use of ***Fulminante*** in the performance analysis is, again, evident in the court's discussion at App. 34. There, citing ***Knowles v. Mirzayance***, 129 S. Ct. 1411 (2009), the court explained that counsel's failure to file the motion

was not "a reasonable decision" because it did not take into account the teachings of *Fulminante*.

The majority continued its application of *Fulminante* when it turned to the question of prejudice. In its *Hill* prejudice analysis, the court was required to determine what impact the failure to file the motion had on Mr. Moore. This required assessment of the harm from availability of the statement as part of *Hill*s trial versus plea determination. *Fulminante*, thus, informs the *Hill* analysis involving the harm arising from the failure to recognize the importance of the motion. App. 41.

Next, the Court of Appeals' determination that the state court's findings were "contrary to clearly established federal law as set forth in *Fulminante*," was in the context of the full prejudice analysis. App. 46. The State ignores the Court of Appeals' recognition that consideration of *Fulminante* was only one part of the required prejudice analysis. App. 38-56, 58-59.

Finally, the State ignores the Court of Appeals reliance on *Fulminante* in its *Hill* analysis in direct response to the State's claim that "the petitioner would have been in no better position if his inculpatory state-ments to police had been suppressed." Resp. Br. at 8.

The Court of Appeals' reference to *Fulminante* as "controlling" did not substitute *Fulminante* for *Hill* or "engraft[ ]" it onto *Hill* as the State asserts. Pet.

Br. at 24. It was, rather, on the facts here, a correct statement of the law that a reviewing court was required to analyze in determining whether a constitutional violation had occurred and, if so, whether it was harmful.

C. In Response To The State's Argument That The Mere Existence Of Other Confessions Rendered Counsel's Actions Proper, The Court Of Appeals Properly Relied Upon *Fulminante*'s Discussion Of Multiple Confessions.

Fulminante is the established law of this Court regarding the harm that would flow from the use of Mr. Moore's tape-recorded confession to the police. In *Fulminante*, the Court rejected the view previously held that use of an involuntary confession is *per se* prejudicial and held that such use is subject to harmless error analysis. 499 U.S. at 288. The analysis there involved the relationship between the voluntarily and involuntarily obtained confessions and assessment of the relative harm flowing from each. *Id.* at 298-302.

1. Fulminante Weighed The Relationship Between, And Relative Harm Flowing From, Each Confession.

Fulminante had confessed to two people, Sarivola and Sarivola's wife. Sarivola, a former police officer working as a paid informant for the Federal Bureau of Investigation, befriended

Fulminante while in prison. *Fulminante*, 499 U.S. at 283. He ultimately obtained a confession from Fulminante to the murder of his daughter, a confession that the Arizona and federal courts determined had been obtained by coercion. *Id.* at 284, 288. Eight months later, while Fulminante was released from prison, he allegedly confessed to Sarivola's wife. Both confessions were introduced at Fulminante's trial. *Id.* at 284.

The question before the Court was whether introduction of the coerced confession was harmless in light of the second confession. In ruling that use of the first confession was not harmless, the Court analyzed the facts and circumstances of the case and looked at the interrelationship between the two confessions. The Court was concerned with the manner in which the two confessions "reinforced and corroborated each other," and with the facts undermining the reliability of the second confession. *Id.* at 299. The Court was also concerned that the jury "could also have believed" or "might have found" Ms. Sarivola had motives to lie. *Id.* at 300.

2. The Court of Appeals Majority Weighed The Relationship Among Mr. Moore's Confessions And The Relative Harm Flowing From Each.

The Court of Appeals majority weighed the factors that rendered the availability of the tape-recorded confession harmful even in the face of the other confessions. The majority believed that the

difference in impact between a formal tape-recorded confession to police and an informal oral confession to friends was significant. App. 43-44.

It is commonly understood that tape-recorded confessions and confessions testified to by police are highly probative. "Listening to a defendant being inculpated by his or her own voice has a persuasive power unrivaled by contradictory testimonial evidence." *State v. Barnett*, 789 A.2d 629, 632 (N.H. 2001). "[L]aw enforcement officials wear an invisible cloak of credibility by virtue of their position." *United States v. Anagnos*, 853 F.2d 1, 4 (1st Cir. 1988) (quoting *Patriarca v. United States*, 402 F.2d 314, 321 (1st Cir. 1969)). The Court of Appeals properly included the distinction in its *Fulminante* analysis.

The Court of Appeals majority considered the relationships among the confessions and weaknesses in the witness's potential testimony. App. 44-45. This parallels the concerns this Court expressed about the manner in which the jury might have viewed Ms. Sarivola. 499 U.S. at 300.

The Court of Appeals' reliance on *Fulminante* was, therefore, consistent with the holdings of this Court. In *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003), the Court acknowledged that "2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *See also Williams*,

529 U.S. at 407 ("state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply ***or unreasonably refuses to extend that principle to a new context where it should apply***") (emphasis added). This point was reiterated in ***Panetti v. Quarterman***, 551 U.S. 930, 953 (2007), where this Court stated that the "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." (internal citations omitted). "The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Id.*

In *Panetti*, the Court identified ***Ford v. Wainwright***, 477 U.S. 399 (1986), as the controlling legal principle even though the *Ford* standard was stated in general terms and the facts in the case before it were not identical. *Panetti*, 551 U.S. at 953. The Court applied *Ford* to the new factual pattern and concluded that there was no reasonable way to properly apply *Ford*, the clearly established Supreme Court precedent, and reach the State's conclusion. *Id.* at 949, 954.

The State's reliance on ***Carey v. Musladin***, 549 U.S. 70 (2006), and ***Wright v. Van Patten***, 552 U.S. 120 (2008), is misplaced. Neither undermines the holdings in ***Lockyer v. Andrade***, ***Williams v. Taylor***, or ***Panetti v. Quarterman***. Both cases are readily distinguishable.

In *Musladin*, the Court of Appeals had granted habeas relief based on its belief that the prejudice arising from spectators wearing buttons in the courtroom with a photo of the victim on them violated due process. It relied on this Court's precedents involving prejudicial in-court conduct by state actors. The Court concluded that it had never addressed the question of a potential due process violation arising from the conduct of private citizens, as contrasted with the conduct of state officials. 549 U.S. at 653-54. The Court went on to note that "lower courts have diverged widely in their treatment of defendants' spectator- conduct claims." *Id.* at 654. As a result, the Court concluded that the Court of Appeals had erred when it held that the California courts had acted contrary to or unreasonably applied clearly established federal law. *Id.*

In *Van Patten*, the Court considered the question of whether the participation of an attorney in a plea hearing by speaker phone was presumptively prejudicial under *United States v. Cronic*, 466 U.S. 648 (1984). The Court reviewed situations in which *Cronic*'s presumption of prejudice, as opposed to *Strickland*'s requirement of proof of prejudice, applies, and concluded that the situation that it confronted was "novel." 552 U.S. at 125. The Court concluded that the absence of a clear answer on the issue precluded relief under 28 U.S.C. § 2254(d)(1). *Id.* at 126.

Both *Van Patten* and *Musladin* involved fact situations that differed in kind from fact situations previously addressed by this Court. Van Patten asked the court to apply *Cronic*, not *Strickland*. In contrast, Mr. Moore's case was decided under the correct standard and involves application of a clearly established principle to a set of facts that fall within and draw upon the guiding principles of this Court's rulings.

The Court of Appeals applied *Fulminante*'s analysis to a state argument that ignored the required assessment of the relationship between or among multiple confessions when one was obtained involuntarily. *Fulminante* rebuts the State's attempt to discredit the strong case for ineffectiveness of counsel based upon defense counsel's failure to understand that his client's statement was taken in violation of the Constitution. *Fulminante* illustrates the prejudice that Mr. Moore suffered, the strength of his assertion that his attorney's advice about the confession motivated his decision to enter a plea, and the reasons that proper advice would likely have altered his decision. Accordingly, the Court of Appeals correctly rejected the State's argument that Mr. Moore would have been in no better position had the motion been filed and granted.

D. The State Court's Findings And Conclusions That Counsel Performed Competently Are Objectively Unreasonable Because That Court Failed To Consider The Harm A Defendant Suffers From Multiple Confessions Or The Relative Weight Of Confessions To Police Versus Civilians.

In the state post-conviction proceedings, the State limited its argument on performance on the suppression issue to defense counsel's assertion that he did not move to suppress because he believed (1) he could not prevail on a motion to suppress and (2) suppression would have been fruitless because two other confessions were available. In the Court of Appeals, the State abandoned the argument that Mr. Moore's confession was voluntarily obtained.

The state court's incorrect assessment of the merits of the foregone motion to suppress severely undermines the reasonableness of its conclusion that counsel acted competently. Further, the state court's conclusion that a motion to suppress would have been "fruitless" was based on an incorrect understanding of the law. The court failed to weigh the relative impact of multiple confessions and confessions to the police versus civilians.

While 28 U.S.C. § 2254(d) limits the circumstances in which the federal courts are permitted to grant relief to habeas corpus petitioners whose claims have been adjudicated on the merits by the state courts, it permits the federal courts to

grant relief when the state court's rulings are either contrary to federal law or are objectively unreasonable.

When a state court ignores the "fundamental principles established" by this Court's "most relevant precedents," it is acting "contrary to" or is unreasonably applying the law within the meaning of 28 U.S.C. § 2254(d). ***Abdul-Kabir v. Quarterman,*** 550 U.S. 233, 258 (2007). If a state court's application of the clearly established law of this Court is objectively unreasonable, a federal court may reject its reasoning and arrive at a contrary conclusion. ***Williams***, 529 U.S. at 413 ("Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."); ***Miller-El v. Cockrell***, 537 U.S. 322, 340 (2003) ("Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief.").

The Court of Appeals' analysis of the harm from the failure to file a motion to suppress followed the directives of the statute and this Court. The Court of Appeals understood what the State no longer contests – that the motion to suppress had merit – and properly concluded that the state court's failure to consider the factors identified in ***Fulminante*** rendered its decision objectively unreasonable. App. 38-52, 60.

E. Mr. Moore Established Prejudice Under *Hill*.

1. After Concluding That Counsel Was Not Ineffective Because A Motion To Suppress Was Meritless And Fruitless, The State Court Did Not Engage In Analysis Of Prejudice As Required Under Hill.

In its conclusions of law, the state post-conviction court stated that "[b]ased on the findings of fact set forth above . . . petitioner was not denied the right to assistance of counsel, as guaranteed by . . . the United States Constitution and as articulated by the United States Supreme Court in *Strickland v. Washington*." App. 206. Under *Strickland*, "there is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697. Thus, a state court may properly deny relief upon finding that a petitioner failed to satisfy *Strickland*'s performance prong, or upon finding that he failed to satisfy *Strickland*'s prejudice prong.

The state post-conviction court erroneously believed that a motion to suppress would have had no merit. Based on that conclusion, it never turned to the question of prejudice under *Hill*. In its eleven findings of fact and four conclusions of law, the state court not only failed to mention *Hill*, but also said nothing about whether Mr. Moore would have gone to trial in the absence of his counsel's failings. The state court's failure to engage in the analysis

required under *Hill* may have been understandable because it was based on its incorrect view of the merits of a motion to suppress. Its failure to do so, however, significantly altered the obligations of the federal courts.

2. *Because The State Court Did Not Address Prejudice Under Hill, The Court of Appeals Was Free To Resolve That Issue De Novo.*

a. *Under The Court's Precedents, No Deference Was Due Under 28 U.S.C. § 2254(d) On The Question Of Prejudice.*

Once the Court of Appeals found that the state court's conclusion that counsel's performance was adequate was an objectively unreasonable application of *Strickland*, it was necessary for it to consider the *Strickland/Hill* prejudice question in deciding whether to grant habeas relief. Because the state court had not addressed the question of whether Mr. Moore would have gone to trial, there was nothing to which the Court of Appeals was required to defer.

Wiggins v. Smith, 539 U.S. 510 (2003), is directly on point. There, the Court found that the state court's conclusion that counsel's investigation satisfied *Strickland* was an objectively unreasonable application of its precedent. *Id.* at 528-29. Because the state court rejected petitioner's claim by only

addressing *Strickland*'s performance prong, when this Court assessed prejudice, its "review [was] not circumscribed by a state court conclusion with respect to prejudice." *Id.* at 534; *accord Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

Similarly, in *Porter v. McCollum*, 130 S. Ct. 447, 451 (2009), the state court disposed of petitioner's *Strickland* claim on the prejudice prong. "Because the state court did not decide whether Porter's counsel was deficient, [the Court] review[ed] this element of Porter's *Strickland* claim *de novo*." *Id.* at 452. Once the Court found counsel's performance deficient, it then applied § 2254(d) deference to the state court's prejudice determination and concluded that the state court's holding that Porter was not prejudiced was unreasonable. *Id.* at 454.

Under *Porter* and *Wiggins*, no § 2254(d) deference is extended to those aspects of the *Strickland/Hill* claim that were not adjudicated on the merits in the state court.

b. The AEDPA Does Not Include A Determination Of Whether The Federal Court's Conclusion Was "Required."

In its argument on deference, the State misstates the standard under the AEDPA, repeatedly asserting that the Court of Appeals failed to give the state court proper deference and that nothing "required" the state court to reach the

conclusion that Mr. Moore likely would have gone to trial. Pet. Br. at 39, 43-48.

The State's argument should be rejected for several reasons. First, as discussed in the preceding section, its analysis of the record ignores the fact that the state court did not cite *Hill*, engage in a *Hill* prejudice analysis, or understand or consider the teachings of *Fulminante*. App. 204-07. Because the state court never performed a *Hill* prejudice analysis, there was nothing for the Court of Appeals to defer to on that point.

Second, the State has incorrectly framed the standard of review. The State repeatedly asserts that nothing in the record "required" the result achieved by the Court of Appeals. This articulation of the standard finds no support in the law. The primary citation offered by the State in support of its argument is the dissenting opinion in *Miller-El v. Dretke*, 545 U.S. 231 (2005). Pet. Br. at 44. That is not surprising because this Court's definition of the deferential review standard under the AEDPA does not go that far. *See, e.g., Renico v. Lett*, 130 S. Ct. 1855, 1865 (2010); *Wood v. Allen*, 130 S. Ct. 841, 849 (2010).

3. The Court of Appeals Properly Concluded That Mr. Moore Established Prejudice Under Hill.

When reviewing ineffective assistance of counsel claims in plea cases, scrutiny of the entire record is

required to determine whether a person would have taken the plea in the absence of counsel's errors. While courts properly examine the petitioner's statements and formal allegations, the complete inquiry is broader and more penetrating. To assess whether a petitioner would have insisted on trial, courts examine the circumstances surrounding the plea. *See, e.g., Berkey v. United States* 318 F.3d 768, 772 -73 (7th Cir. 2003) ("[a] mere allegation by the defendant that he would have insisted on going to trial is insufficient to establish prejudice. Berkey must establish through objective evidence that a reasonable probability exists that he would have gone to trial.") (internal citations omitted). In this case, review of the full record supports the Court of Appeals' careful analysis of the facts and circumstances which resulted in its finding of a reasonable probability that Mr. Moore would not have pled no contest to murder had his lawyer recognized the inadmissability of the taped confession.

This record contains at least three distinct factors supporting the conclusion of the Court of Appeals. First, Mr. Moore has maintained throughout that the death of his friend was the result of an accidental shooting. As he explained in the post-conviction trial, Mr. Moore's understanding was that an accidental death meant manslaughter, the crime to which his half-brother Lonnie Woolhiser was permitted to plead.

Q. In your mind, what– what charge is an accident death? What crime is that?

A. Manslaughter, Criminal Negligent Homicide.

J.A. 170. While, as the State and *Amici* point out, in Oregon, an accidental death in the course of a kidnapping can be charged as felony murder (Pet. Br. 51; Br. of *Amicus* Criminal Justice Legal found at 7; Br. of *Amicus* Attorneys General at 7), that is not a layman's understanding, nor was it Mr. Moore's.

Second, this case was not resolved on a traditional plea of guilty, but, rather, on a no contest plea. No contest pleas are rare in the criminal justice system.[4] They are often entered to minimize risk by defendants who do not believe they are guilty. The record here shows that Mr. Moore was reluctant to plead guilty. Supp. App. 6. These facts are significant evidence that even a small change in the calculus would have altered Mr. Moore's decision-making process and supports the likelihood that Mr. Moore would have proceeded to trial had he been properly advised.

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[4] In 2004, the most recent year with statistics separating no contest and guilty pleas, 72,152 federal criminal cases were disposed of pursuant to a plea and only 460, or .64%, of these were no contest. Sourcebook of Criminal Justice Statistics: Disposition Of Cases Terminated In U.S. District Courts (2004), http://www.albany.edu/sourcebook/pdf/t5172004.pdf.

Third, once Mr. Moore learned of his attorney's failings, he filed timely pleadings in the state, and later the federal, court to have his conviction set aside. As the State notes (Pet. Br. at 43), Mr. Moore did not explicitly testify in the post-conviction trial that he would have gone to trial. However, his testimony about the bright line rule and the impact of his attorney's erroneous advice about the confession on his decision to enter a plea (Supp. App. 23), coupled with his actions to set aside his plea, fully support the Court of Appeals' conclusion that the evidence satisfied *Hill*. Had Mr. Moore known there was a strong chance his confession to the police could be suppressed, it is highly likely that this knowledge would have tipped the balance. Mr. Moore's situation stands in stark contrast to that in *Weaver v. Palmateer*, 455 F.3d 958, 968 (9th Cir. 2006), where the court found no likelihood that the petitioner would have rejected the State's plea offer and insisted on trial when, *inter alia*, he "'did not want to put [the victims] through the trauma of trial.'"

The record demonstrates why Mr. Moore was wise in his reluctance to enter a plea to felony murder. As the Court of Appeals pointed out, the plea offer made to Mr. Moore yielded the same conviction and sentence as that received by the co-defendant, Salyer, who went to trial. App. at 32-33. Another co-defendant, Mr. Woolhiser, was permitted to plead to manslaughter, a charge that carried a lesser sentence, and the charge that Mr. Moore believed more appropriately described his conduct.

Supp. App. at 22, 41. There was, thus, little incentive given Mr. Moore to enter a plea. As stated by Woolhiser's attorney at sentencing, all of the statements from all of the participants were to the effect that the shooting was accidental. Supp. App. at 6. As described by the prosecutor, the men were climbing a hill and, initially, Woolhiser had the gun. App. at 226. Indeed, according to the prosecutor, Woolhiser is the person who brought the gun to the scene and went into Mr. Rogers' house and hit him while Mr. Moore remained outside. App 224, 226. The prosecutor's account acknowledged that the victim slipped at least twice on the hill and fell, and the second time the muzzle hit his temple and the gun discharged. App. at 227.

Thus, there is a reasonable likelihood that Mr. Moore would not have been harmed at all had he gone to trial. At worst, his sentence would likely have been the same as the one he received upon his plea. While there was certainly evidence that could have supported a conviction, and possibly a more onerous sentence, had Mr. Moore gone to trial, the full record supports his contention, and the Court of Appeals' conclusion, that he would have taken the risk rather than accept the plea deal that was offered if he had been properly advised.

The analysis of the concurrence reinforces the prejudice Mr. Moore suffered under *Strickland* and *Hill* from his counsel's failure to properly assess the confessions. In the real world of the criminal justice system, with resolution of the overwhelming

majority of cases taking place through the plea process, counsel's failure to develop as compelling a case as possible for use in plea negotiations is often the most damaging mistake an attorney can make.

As stated in *Glover v. United States*, 531 U.S. 198, 203 (2001), "any amount of actual jail time has Sixth Amendment significance." Thus, "if an increased prison term did flow from an error the petitioner has established *Strickland* prejudice." *Id.* at 200. Under *Glover*, if an attorney fails to understand the law and facts of his client's case – as was the case with Mr. Moore's counsel – and does not act to maximize the potential for a beneficial plea bargain, his client has been prejudiced.

Mr. Moore does not disagree with the decision tree set out by Amicus Criminal Justice Legal Foundation. Br. of *Amicus* at 12. The brief, however, ignores the fundamental factual premise of this case – that those involved understood that what occurred was not planned but was, rather, a tragedy or accident. Supp. App. 06-09; App. 227; JA 155-56. While a capital prosecution was a very remote possibility, given that Mr. Moore did not participate in the beating of Mr. Rogers (App 224), that Mr. Woolhiser brought the gun to the scene (App 226), and that Mr. Moore only took possession of the gun after Woolhiser slipped on the hill, it was reasonable for Mr. Moore to believe that the risk of going to trial and receiving a sentence greater than he did on the plea was quite small.

Had a motion to suppress been filed, "there is a reasonable probability that" Mr. Moore "would not have pleaded [no contest] and would have insisted on going to trial." *Hill*, 474 U.S. at 59. The full record supports the Court of Appeals' conclusion.

F. Based On The Settled Method Of Analysis Of Prejudice Under *Hill*, The Court of Appeals' Opinion Neither Shifts The Burden Of Proof Nor Jeopardizes Many Convictions Obtained On Guilty Pleas.

The State and *Amicus* Attorneys General argue that the approach taken by the Court of Appeals is a radical departure from the approved method of analysis of prejudice under *Hill*. Pet. Br. at 32-33; Br. of *Amicus* at 12-14. That is simply not the case. While the result reached by the Court of Appeals – granting relief – is not common, the mode of analysis is precisely what is required under *Hill* and what the federal courts throughout the country have been doing since that case was decided with no adverse impact on state justice systems.

A review of federal cases decided since *Hill* shows that courts regularly apply the analysis employed by the Court of Appeals. In most cases, courts hold that, given the strength of the State's case, the foregone defense or motion would not, in all likelihood, have carried the day. Accordingly, courts generally find no reasonable probability that the petitioner would have rejected the plea offer even if counsel had performed effectively. *See, e.g., Nelson*

v. Hvass, 392 F.3d 320, 322-23 (8th Cir. 2004) (finding that petitioner failed to establish he would have insisted on trial if his attorney had adequately advised him); *Koper v. Angelone,* 961 F.Supp. 916, 922 (W.D. Va. 1997) ("Koper has not demonstrated that a reasonable defendant in his place, but for his counsel's unprofessional errors, would not have pleaded guilty but would have proceeded to trial. The Commonwealth has a strong case for first degree murder.").

The state and federal courts routinely utilize their best judgment when attempting to determine how a particular action or inaction would likely have affected the outcome of a case. This Court recently noted the lack of certainty in conducting *Strickland*'s prejudice inquiry. *Sears v. Upton*, 130 S. Ct. 3259, 3626-27 (2010) (per curiam) (noting the inquiry "will necessarily require a court to 'speculate' as to the effect of the new evidence-regardless of how much or how little mitigation evidence was presented during the initial penalty phase"). The Court of Appeals followed this approach in exercising its judgment. Even the dissenter recognized the need to assess the merits of the motion counsel had not filed and other evidence in the case in order to determine if the *Hill* standard had been met. App. at 149 & n.26.

Granting relief to Mr. Moore will not open a floodgate to challenges to guilty pleas. As noted in *Padilla*, habeas corpus challenges to guilty pleas are far less common than habeas corpus challenges to convictions obtained after a trial. 130 S. Ct. at 1485.

Few defendants are likely to view themselves in the same position as did Mr. Moore, that is facing little downside if they are successful in having a guilty plea overturned. *Id.* The decision of the Court of Appeals did not make new law or shift the burden of proof. Nor would a decision of this Court affirming the Court of Appeals.

G. The Ineffectiveness In This Case Lies In Counsel's Failure To File A Motion To Suppress Because He Failed To Understand The Applicable Law And Facts Related To The Motion, Not His Failure To File It In The Abstract.

The *Amici* and the dissenter in the Court of Appeals posit that the decision of the Court of Appeals will require defense attorneys to file needless motions to suppress. Br. of *Amicus* Attorneys General at 16; App. at 96, 148. Their arguments misread the majority opinion. Mr. Moore's complaint, and the majority's concern, is not simply that Mr. Moore's attorney did not file a motion. It is also that he failed to understand the applicable law and failed to assess the facts in light of that law before making his decision. Mr. Moore did not receive what the Court in *Knowles* held he was entitled to have: a reasonable assessment of a potential claim. To forego a defense, an attorney "is not required to have a tactical reason- above and beyond a reasonable appraisal of a claim's dismal prospects for success." 129 S. Ct. at 1422.

Unlike the situation in *Knowles*, while Mr. Moore's attorney believed the likelihood of success on a motion to suppress was dismal, his appraisal was not reasonable. He did not understand that the law supported suppression, a point the State did not even contest below. Nor did he understand that the availability of other confessions was not the end of the required analysis. The teaching of *Fulminante* is that suppression of the tape-recorded statement to the police would significantly alter the strength of the State's case.

No claim of ineffective assistance would lie had Mr. Moore's counsel correctly advised Mr. Moore that he had a strong motion to suppress but that other compelling factors in the case militated against filing the motion. Mr. Moore does not take issue with the statements of *Amici* or the dissenter that a competent attorney will often advise a client to forego a motion for strategic reasons. As this Court has repeatedly stated, however, a decision is only "strategic" if made with a sound understanding of the facts and law. *See Kimmelman*, 477 U.S. at 386 (counsel failed to seek suppression without investigating viability of motion); *Williams,* 529 U.S. at 395 (failure to seek mitigation evidence resulted from misunderstanding of state law); *Wiggins*, 539 U.S. at 512 (failure to thoroughly investigate stemmed from counsel's inattention). Accordingly, the failure of Mr. Moore's counsel cannot be deemed strategic.

The State's and *Amicus'* references to ***McMann v. Richardson***, 397 U.S. 759 (1970), are inapposite. One of the core aspects of ***McMann*** was the fact that the claimed ineffectiveness of counsel with respect to the coerced plea involved a situation in which the law changed between the time of plea and the post-conviction proceedings. 397 U.S. at 772-73. Moreover, the Court stated that incompetence of advice with respect to the admissibility of statements could be based on a demonstration of "gross error on the part of counsel when he recommended that defendant plead guilty instead of going to trial and challenging the New York procedures in determining the admissibility of confessions." *Id.* at 772. Because, however, the Court had previously rejected such a challenge, it concluded that "[s]uch showing cannot be made[.]" *Id.* In contrast, Mr. Moore's claim involves reliance on existing law and a gross error – counsel's failure to recognize that the motion to suppress was well-founded.

In addition, the decisions in *Hill* and *Padilla* make clear that *McMann* does not foreclose a petitioner from challenging the effectiveness of the advice he receives from counsel pretrial. Mr. Moore is properly focusing his habeas corpus challenge on the defective advice he received with respect to the motion to suppress and the manner in which he was prejudiced thereby. The State and *Amici* fail to appreciate that counsel's advice with respect to the plea question was infected and rendered

incompetent by his mistaken assessment of the confession.

CONCLUSION

Mr. Moore made three statements: one to his brother, one to a friend, and one to the police. The statement taken by the police was detailed and tape-recorded. It was inadmissible because it was involuntary and also because it was taken after Mr. Moore asserted his right to counsel. Mr. Moore's lawyer failed to recognize both the strength of the potential motion to suppress and the distinction among the three statements. Mr. Moore reluctantly entered a plea of no contest because his attorney failed to properly advise and advocate for him. The state post-conviction court unreasonably determined that the tape-recorded statement was admissible and that even a meritorious motion to suppress would have been fruitless.

The district court concluded that the statement was involuntarily taken. The State does not contest that conclusion. The Court of Appeals properly applied this Court's established precedent in concluding that Mr. Moore was prejudiced by his attorney's failure to move to suppress the

inadmissible statement. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted this 13th day of August, 2010.

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REPLY BRIEF

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In the Supreme Court of the United States

JEFF PREMO, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

RANDY JOSEPH MOORE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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INTRODUCTION

Although Moore tries to downplay the Ninth Circuit's reliance on *Arizona v. Fulminante,* 499 U.S. 279 (1991), he nonetheless argues that *Fulminante* directly supports his claim for relief, and that the state post-conviction court erred by failing to consider *Fulminante*'s "teachings." This Court should conclude, however, that *Fulminante*'s holding is inapplicable to this case. Because Moore pleaded no contest, the direct-review harmless-error inquiry in *Fulminante* is neither factually similar nor analytically analogous to the ineffective-assistance prejudice inquiry that applies here. Those inquiries are fundamentally and indisputably different.

If this Court concludes—as it should—that *Fulminante* does not apply to the prejudice inquiry in a case like this, it follows that Moore is not entitled to relief under 28 U.S.C. § 2254(d)(1). Because *Fulminante* is inapplicable, *Fulminante* cannot qualify as "clearly established Federal law" for purposes of this case, the state post-conviction court's ruling cannot be deemed "contrary to" it, and any state court "failure" to apply *Fulminante* cannot reflect an "unreasonable" application of *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court should reject Moore's other arguments as well. Moore claims that *de novo* review

of the state court's legal and factual determinations is appropriate because it did not address whether, under *Hill v. Lockhart,* 474 U.S. 52 (1985), counsel's purported misconduct affected Moore's decision to plead no contest. Nothing, however, required the state court to refer to *Hill*. *Hill* is a subset of *Strickland*'s general prejudice standard, and the state court expressly cited and applied *Strickland*. Moreover, the state court based its ruling not just on *Strickland*'s "deficiency" prong, but on its prejudice prong as well. Because the court adjudicated the merits of Moore's prejudice claim, § 2254(d) requires deferential review of the state court's legal and factual determinations.

In turn, deference to the state court's factual determinations under § 2254(d)(2) disposes of Moore's claim that the evidentiary record entitles him to relief. Nothing required the state post-conviction court to draw the factual inferences that Moore's claim for relief depends on. Instead, the record entitled the state court to find that even a successful suppression motion would not have affected Moore's decision to plead no contest.

ARGUMENT

A. In relying on *Arizona v. Fulminante*, the Ninth Circuit relied on a holding that is inapplicable to this case.

1. The record belies Moore's suggestion that the Ninth Circuit placed no undue weight on *Fulminante*.

As a preliminary matter, this Court should reject Moore's attempts to downplay the extent to which the Ninth Circuit relied on *Fulminante*. According to Moore, the Ninth Circuit's "determination that the state court's findings were 'contrary to clearly established federal law as set forth in *Fulminante*' was in the context of the full [*Strickland*] prejudice analysis," and the Ninth Circuit "recogni[zed] that consideration of *Fulminante* was only one part of the required prejudice analysis." Resp. Br. 20. Moore suggests that the Ninth Circuit invoked *Fulminante* merely to inform its assessment of the potential significance of Moore's tape-recorded confession to police, but did not treat *Fulminante* as a holding that directly controls this case.

In fact, the Ninth Circuit treated *Fulminante* as the *preeminent* part of the prejudice analysis. The Ninth Circuit responded to the proposition that Moore's confessions to his brother and to Debbie Ziegler could have incriminated him at a trial, and that counsel thus did not prejudice

Moore by not moving to suppress Moore's confession to police, by stating that "the Supreme Court squarely rejected a markedly similar argument in *Arizona v. Fulminante*," a "case that is, *a fortiori*, controlling here." App. 41 (footnote omitted). The Ninth Circuit described *Fulminante* as directly "govern[ing]" any case in which an attorney acts unreasonably by failing to move to suppress a confession. *See* App. 19 ("[b]ecause Moore's claim involves the failure to suppress a confession, the prejudice question is governed by *Fulminante*"). And the Ninth Circuit held that the state court—in rejecting Moore's prejudice claim on the ground that Moore's other confessions would have made a motion to suppress "fruitless"—acted "contrary to clearly established federal law as set forth in *Fulminante*." App. 46 (footnote omitted). The Ninth Circuit treated *Fulminante*'s holding as dispositive, and as far more than a mere "part" of the prejudice analysis.

2. Because the inquiry in *Fulminante* is fundamentally different from the inquiry required in this case, *Fulminante*'s holding is inapplicable.

Fulminante was a direct-review harmless-error case, in which the dispositive inquiry was whether the state had shown that evidentiary error—at an already concluded trial—was harmless beyond a reasonable doubt. 499 U.S. at 297. In contrast, this is a collateral-review case, in which

Moore bore the burden of proving that counsel's purportedly deficient conduct affected Moore's *pretrial* decision to plead no contest. *See* Or. Rev. Stat. § 138.620(2) (requiring Oregon post-conviction petitioners to establish facts alleged in a petition by a preponderance of the evidence); *Wong v. Belmontes*, 558 U.S. ___, 130 S. Ct. 383, 390-91 (2009) ("*Strickland* places the burden on the [criminal] defendant, not the State, to show a 'reasonable probability' that the result would have been different"). Because those two inquiries are fundamentally different, *Fulminante* can play no meaningful role in a case like this. This Court should reject Moore's assertions to the contrary. *See, e.g.*, Resp. Br. 20 (asserting that the state post-conviction court failed to "take into account the teachings of *Fulminante*" and therefore made an unreasonable decision).

In holding that an erroneously admitted confession was not harmless, *Fulminante* necessarily focused on how its admission influenced the jury's assessment—during an already completed trial—of the state's properly admitted evidence. The Court emphasized that, although Fulminante's confession to Donna Sarivola correctly was admitted, "the jurors might have found Donna Sarivola's story unbelievable" had the confession to Anthony Sarivola been excluded; that is, jurors might have relied on the inadmissible confession as "corroborat[ion]" of the admissible

confession. 499 U.S. at 298-99. The Court also noted that, had the confession to Anthony Sarivola been excluded, the state would have been unable to admit additional prejudicial evidence that it used to explain why Fulminante "would have been motivated to confess to [Anthony] Sarivola." 499 U.S. at 300. Emphasis on those factors—that is, analysis of the relationship at trial between inadmissible and other evidence—makes sense only if a court is conducting a *post*-trial harmless-error inquiry.

Those factors cannot meaningfully be invoked in a case like this, in which courts must assess whether a suppression ruling affected a defendant's *pretrial* decision to accept a plea offer and to forgo trial altogether. Unlike the focus in *Fulminante,* the focus in this case is on the pretrial decision-making process that Moore and counsel would have gone through, not on evidence that was presented at trial. Each factor discussed below is critical to the *Strickland* prejudice analysis in this case, but none would be relevant to a *Fulminante* harmless-error analysis.

First, in deciding whether to accept the state's plea offer, and in choosing to do so before litigating any suppression motions, Moore needed to assess whether the state would have difficulty proving felony murder based on evidence that did *not* include his confession to police.

Second, Moore's pretrial decision required him to recognize that the state was still in the process of investigating the victim's death. He needed to recognize that, if he rejected the plea offer, not only might the state charge him with additional crimes (including aggravated murder), but it might—in the meantime—uncover additional evidence that would make it even easier to prove its case.

Third, Moore needed to assess the severity of the sentences that he might receive (including the possibility of consecutive sentences)[1] if he went to trial and failed to earn an acquittal. In addition, he needed to consider any other factors that were personally important to him in assessing the risks of a jury trial. *See, e.g.*, App. 75 (counsel's affidavit, noting that Moore "felt very strongly" that Lonnie Woolhiser "was much less culpable than he was himself," and that Moore "was very interested in the offer the State was making to his brother").

---

[1] Under Oregon law, a trial court may impose consecutive sentences for offenses arising out of "a continuous and uninterrupted course of conduct" if it finds that each offense indicates a "defendant's willingness to commit more than one criminal offense," or that each offense "created a risk of causing greater or qualitatively different loss, injury or harm to the victim." Or. Rev. Stat. §§ 137.123(5)(a) and (b).

None of those factors could play a role in a *Fulminante* harmless-error inquiry. Instead, *Fulminante* assessed the manner in which the erroneous admission of a confession—at an already completed trial—might have influenced the jury's evaluation of other evidence. That assessment is not directly transferable to a defendant's pretrial decision to forgo trial altogether. *Fulminante* does not apply to this case.[2]

3. If *Fulminante* controls this case, the practical effect will be to reduce a defense attorney's ability to make strategic choices on a client's behalf.

If the Ninth Circuit is correct, a defense attorney who believes that the state possesses overwhelming and admissible evidence of a client's guilt will have little incentive to advise a client to

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[2] Ultimately, the Ninth Circuit appears to have made the analytical error of treating *Strickland*'s ineffective-assistance prejudice inquiry and *Fulminante*'s harmless-error inquiry as if they were alternative ways of expressing the same standard. By writing that the state court's "determination that the taped confession was *harmless* was contrary to clearly established Supreme Court law as set forth in *Fulminante*," App. 60 (emphasis added), the Ninth Circuit suggested that the *Strickland* prejudice test and *Fulminante*'s harmless-error test are interchangeable.

accept a favorable plea offer early in a case. The Ninth Circuit's decision suggests that an attorney, to best protect his or her professional interests, should instead urge a client to reject any and all plea offers until motions to exclude prosecution evidence have been fully litigated. The decision reduces a defense attorney's flexibility to make strategic choices, and ignores the "wide latitude" and independence that criminal defense attorneys are entitled to. *See Strickland,* 466 U.S. at 688-89 ("[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant," and "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions").

Restricting the options available to defense attorneys ultimately will undermine their clients' interests. As Judge Bybee's dissent noted, "[a] requirement that defense counsel file any potentially meritorious pretrial motions or risk being found incompetent on collateral review will skew plea negotiations where the considerations promoting negotiation include whether the defendant will file a motion to suppress." App. 113-14. "If, in response to the majority's new rule, counsel must file all motions, defense counsel loses a bar-

gaining chip and will almost certainly face a much less cooperative prosecutor." App. 114.

B. Because *Fulminante* does not directly apply to the inquiry in a case like this, it necessarily follows that Moore cannot obtain relief under 28 U.S.C. § 2254(d)(1).

Federal habeas relief is appropriate under 28 U.S.C. § 2254(d)(1) if a state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." The Ninth Circuit held that the state post-conviction court's decision was contrary to "clearly established" law announced in *Fulminante,* and that the state court unreasonably applied *Strickland*'s prejudice standard. App. 46, 20. But if this Court concludes—as it should—that *Fulminante* can play no meaningful role in a case like this, relief under § 2254(d)(1) necessarily is unavailable. Because *Fulminante* is inapplicable, *Fulminante* cannot be "clearly established Federal law" for purposes of this case, and the state court could not have acted "contrary to" it in rejecting Moore's prejudice claim. And if *Fulminante* is inapplicable, the state court cannot be deemed "unreasonable" for not applying *Fulminante* to *Strickland*'s prejudice analysis.

C. This Court should reject Moore's assertion that the only deference required on review is deference to the Ninth Circuit.

1. Despite Moore's assertion that the Ninth Circuit was entitled to engage in *de novo* review, 28 U.S.C. § 2254 required deference to the state-court ruling.

Moore asserts that, under *Porter v. McCollum*, ___ U.S. ___, 130 S. Ct. 447, 451 (2009), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), "no § 2254(d) deference is extended to those aspects of the *Strickland/Hill* claim that were not adjudicated on the merits in state court." Resp. Br. 31. He argues that because the state post-conviction court did not cite *Hill* or expressly address "whether [he] would have gone to trial in the absence of his counsel's failings," it failed to adjudicate his prejudice claim, and the Ninth Circuit was free to apply *de novo* review. Resp. Br. 29-30. But because the state court did adjudicate the merits of Moore's prejudice claim, it was entitled to deference under 28 U.S.C. § 2254(d)(1) and (2).

Porter, *Wiggins*, and *Rompilla* do not extend as far as Moore suggests. In those cases, a state court rejected an ineffective-assistance claim after addressing only one of *Strickland*'s two prongs. *See Porter*, 130 S. Ct. at 452 (state court

addressed "prejudice" prong only); *Wiggins,* 539 U.S. at 534 (state court addressed "deficiency" prong only); *Rompilla,* 545 U.S. at 390 (same). Because each state court failed to adjudicate the merits of the petitioner's claim under *Strickland*'s remaining prong, this Court analyzed the remaining prong "*de novo*," without assessing whether the state court decision was "contrary to, or an unreasonable application of, clearly established Federal law." *See Wiggins,* 539 U.S. at 534 ("our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis"); *Porter,* 130 S. Ct. at 452 ("[b]ecause the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*"); *Rompilla,* 545 U.S. at 390 ("[b]ecause the state courts . . . never reached the issue of prejudice," "we examine this [other] element of the *Strickland* claim *de novo*").

Here, however, the state post-conviction court did address *Strickland*'s prejudice prong. The court concluded that Moore "did not prove any of his claims" and "was not denied the right to assistance of counsel...articulated by...*Strickland v. Washington*." App. 206-07. Further, the state court denied Moore's claim not merely because it believed that a suppression motion would have been denied (and that counsel thus acted rea-

sonably by not filing it) but because a motion, even if successful, "would have been fruitless" in light of the state's other evidence. The state court noted that trial counsel's affidavit "offered *two* reasons for not filing the motion." App. 204 (emphasis added). The first reason was that "there was no [legal] basis for filing a motion." The second was that, because Moore "had previously confessed" to Raymond Moore and "another friend," "[a] motion to suppress would have been fruitless." App. 205. In rejecting Moore's claim on those grounds, the state court necessarily ruled that any failure to file a suppression motion would not have prejudiced Moore, even if the motion would have been granted, due to other evidence that the state possessed. In short, the state court did adjudicate Moore's prejudice claim under *Strickland*.

The state post-conviction court did not cite *Hill*. But to "adjudicate" the merits of Moore's prejudice claim for purposes of § 2254(d), the court did not need to cite *Hill* or otherwise refer to it. *Hill*, as this Court has explained, is merely a subset of *Strickland*'s general prejudice standard. *See Hill*, 474 U.S. at 58-59 ("the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel," and *Strickland*'s "'prejudice' requirement" requires a defendant to show "a reasonable probability that, but for counsel's errors,

he would not have pleaded guilty and would have insisted on going to trial"; footnote omitted). The *Hill* Court—rather than creating a prejudice standard that is separate from the *Strickland* standard—itself applied the *Strickland* prejudice standard. *See Hill,* 474 U.S. at 60 ("petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of 'prejudice'").

Although the state post-conviction court did not expressly refer to *Hill*, it undoubtedly addressed—and rejected—Moore's claim that he established prejudice under *Strickland*. For that reason, and because nothing in the state-court ruling contradicts *Strickland* or *Hill,* that ruling warrants deference under § 2254(d). *See Early v. Packer,* 537 U.S. 3, 8 (2002) (§ 2254(d)(1) "does not require citation of our cases [by the state court]" and "does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them"; emphasis in original).[3]

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[3] *See also Bell v. Cone,* 543 U.S. 447, 455 (2005) ("[f]ederal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation").

2. The Ninth Circuit's factual determinations do not warrant deference.

Because the state post-conviction court adjudicated the merits of Moore's prejudice claim, deference applies not just to its legal determinations under 28 U.S.C. § 2254(d)(1) but to its factual determinations as well. Under § 2254(d)(2), habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication . . . resulted in a decision that was based on an *unreasonable* determination of the facts in light of the evidence presented in the State court proceeding." (Emphasis added.)[4]

Nonetheless, Moore suggests that this Court should defer to any factual determinations made by the Ninth Circuit. According to Moore, affirmance is required because the record "supports the [Ninth Circuit's] finding of a reasonable probability" that, had counsel filed a suppression motion, Moore would have gone to trial. Resp. Br. 33. Moore thereby suggests that this Court must defer to any prejudice "findings" that the Ninth Circuit purported to make, so long as the record

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[4] *See also* 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct," and a habeas "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence").

contains evidence that can be read as supporting those findings. But because the state post-conviction court adjudicated Moore's prejudice claim, it is *that court* whose factual determinations warrant deference, so long as its factual determinations were "reasonable." Deference to any putative Ninth Circuit findings is neither required nor appropriate.

3. Under § 2254(d)(2), Moore can prevail only if the state court was "required" to draw the factual inferences that Moore's claim depends on.

Moore claims that it is reasonably likely that, had counsel filed a suppression motion, he would have gone to trial. Resp. Br. 36. In rejecting Moore's prejudice claim, the state post-conviction court necessarily found that Moore failed to establish that likelihood. Because the state court adjudicated the merits of the prejudice claim, § 2254(d)(2) authorizes relief only if the adjudication "resulted in a decision that was based on an *unreasonable* determination of the facts." (Emphasis added.) If the factual inference that Moore urges is not the *only* reasonable inference permitted by the record, the state court was entitled to reject it, and the state court's factual determinations (and any resulting rejection of Moore's prejudice claim) can provide no basis for relief.

Although Moore claims that AEDPA's "deferential review standard does not go that far," Resp. Br. 32,[5] the reasoning described above is absolutely consistent with § 2254(d)(2)'s text. It also is consistent with this Court's construction of § 2254(d)(1)'s similarly worded "reasonableness" standard, which provides that a petitioner may obtain relief by showing that a state court "unreasonabl[y]" applied clearly established law. *See Yarborough v. Alvarado*, 541 U.S. 652, 664-65 (2004) (because some facts supported conclusion that interrogated person was in custody, and because others supported opposite conclusion, the "state court's application of our custody standard

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[5] Moore somewhat misstates the state's argument. According to Moore, the state argued that "nothing in the record 'required' the result achieved by the Court of Appeals." Resp. Br. 32. In fact, the state—rather than asserting that the record did not require the *Ninth Circuit* to rule as it did—argued that "[n]othing required the *state court* to infer from Moore's deposition testimony that Moore likely would have gone to trial had counsel filed a motion to suppress." Pet. Br. 44 (emphasis added; bold omitted). The state further argued that, "[u]nless the only reasonable inference that the record permits, with respect to Moore's deposition testimony, is the inference urged by Moore, the state court was free to reject that inference." Pet. Br. 44 (emphasis omitted).

was reasonable" for purposes of § 2254(d)(1)); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (because "[n]o holding of this Court *required* the California Court of Appeal to apply the test of *Williams* and *Flynn* to the spectator's conduct," state court decision was not "unreasonable" under § 2254(d)(1); emphasis added).

4. Although *Strickland*'s prejudice test permits a limited role for "speculation," speculation alone cannot assist Moore at this stage of his habeas case.

Moore acknowledges that he "did not explicitly testify in the post-conviction trial that he would have gone to trial" had counsel moved to suppress his confession to police. Resp. Br. 35. Perhaps as a result, he invokes *Sears v. Upton*, ___ U.S. ___, 130 S. Ct. 3259 (2010), to suggest that courts, in assessing prejudice under *Strickland*, "routinely" engage in "speculation." Resp. Br. 39; *see Sears*, 130 S. Ct. at 3266-67 (to assess whether an attorney's failure to present additional mitigation evidence at a penalty-phase trial prejudiced petitioner, courts "'speculate' as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase"). Use of the word "speculate" in *Sears*, however, does not suggest that Moore could establish *Strickland* prejudice by showing a mere *possibility* that a suppression motion would have affected his decision to plead

no contest, or by showing that a motion "conceivably" could have affected his decision. Instead, this Court has described the *Strickland* prejudice standard as rigorous. In *Williams v. Taylor,* 529 U.S. 362, 394-95 (2000), the Court described the following formulation as the "correct standard":

> *[I]t is insufficient to show only that the errors [by counsel] had some conceivable effect on the outcome of the proceeding*, because virtually every act or omission of counsel would meet that test . . . *The petitioner bears the highly demanding and heavy burden in establishing actual prejudice.*

(Emphasis added; internal quotes omitted.)

It also must be remembered that, once a state court has adjudicated and rejected a prejudice claim under *Strickland,* a petitioner can challenge that adjudication only by clearing a second and independent "demanding" hurdle—the highly deferential standard that AEDPA created. *See Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 240 (2005) (§ 2254 creates a "demanding" standard for obtaining relief). At this point in the collateral-review process, "speculation" alone cannot entitle Moore to relief.

D. Nothing required the state post-conviction court to find a reasonable probability that Moore would have gone to trial had counsel filed a suppression motion.

1. The "distinct factors" that Moore identifies did not compel a finding that counsel's conduct prejudiced him.

Moore claims that "three distinct factors" support the Ninth Circuit's "finding of a reasonable probability that [Moore] would not have pled no contest to murder had his lawyer recognized the inadmissibility of the taped confession." Resp. Br. 33. Moore mistakenly frames the issue as whether the record contains evidence that could support a *de novo* determination by the Ninth Circuit. Furthermore, Moore exaggerates the import of the factors in question.

First, Moore notes that he "has maintained throughout" that the victim's death resulted from an "accidental shooting," and he notes that his "understanding was that an accidental death meant manslaughter." Resp. Br. 33. Second, Moore cites Supp. App. 6 as evidence that he "was reluctant to plead guilty," and he describes that as "significant evidence that even a small change in the calculus would have altered [his] decision making." Resp. Br. 34; *see* Supp. App. 6 (containing counsel's statement at sentencing

that it was "very difficult" for Moore "to take the plea offer"). But whether or not counsel moved to suppress Moore's confession to police, Moore's belief that the shooting was accidental, his general reluctance to plead guilty to a murder charge, and any philosophical differences he had with the concept of felony murder presumably would not have changed.[6] Nothing about the first two factors that Moore identifies suggests that a suppression motion would have altered the "calculus" in which Moore engaged, or would have altered the result of that calculus.

Third, Moore notes that "once [he] learned of his attorney's failings, he filed timely pleadings in the state, and later the federal, court to have his conviction set aside." Resp. Br. 35. Moore, however, bore the burden of proving his claim for state post-conviction relief with *evidence*. *See* Or. Rev. Stat. § 138.620(2) (state post-conviction petitioner must prove "facts alleged in the petition" by a preponderance "of the evidence"). Nothing in

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[6] In any event, the record suggests that Moore's lawyer ultimately convinced him—correctly—that Oregon law treats accidental shootings as murder when they occur in the course of a felony, and when the victim dies as a result. *See* Supp. App. 6 (containing counsel's statement at sentencing that "it's been a hard thing for [Moore] to understand . . . the concept of felony murder and how it could apply in a situation where . . . it was an accidental shooting").

Oregon's statutory scheme for post-conviction proceedings, nothing in the federal habeas statutes, and nothing in this Court's case law, suggests that filing a timely petition for relief—in either state or federal court—constitutes *evidence* supporting relief.

2. The state court was not required to find that Moore had "little incentive . . . to enter a plea."

Moore admits that, had he not pleaded guilty to felony murder, "there was certainly evidence that could have supported a conviction," and he admits that "possibly a more onerous sentence" would have resulted "had [he] gone to trial." Resp. Br. 36. Nonetheless, he claims he had "little incentive . . . to enter a plea" because "[a]t worst, his sentence would likely have been the same as the one he received upon his plea," and because "a capital prosecution was a very remote possibility, given that [he] did not participate in the [victim's] beating" or bring the murder weapon to the scene of the crime. Resp. Br. 36-37.

Moore does not dispute that he entered his plea because he agreed with counsel that—with or without evidence of the confession to police—a felony murder conviction was a near certainty, and an aggravated murder charge and conviction were possibilities. The record—as discussed below—suggests that a successful suppression mo-

tion would *not* have altered counsel's advice about Moore's prospects at a trial, would not have affected the accuracy of that advice, and would not have affected Moore's decision.

Even without evidence of Moore's confession to police, the state still would have possessed evidence that Moore had made a "full confession" to Raymond Moore and to Debbie Ziegler. *See* App. 70 (trial counsel's affidavit). Although Moore may not have beaten the victim or made the decision to bring the murder weapon to the scene of the crime, his confessions established that he alone—and not his co-defendants—personally killed the victim by firing the fatal bullet. He thus was potentially liable under Oregon law not only for felony murder, but for aggravated murder.[7]

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[7] According to Moore, "that Raymond Moore and Ms. Ziegler were present during the interrogation when the confession was unlawfully obtained would have necessitated a taint hearing to determine what they had previously heard concerning the crime and to ensure that they did not testify to what they had learned during the interrogation." Resp. Br. 4 n. 2. Moore has never previously alleged, however, that trial counsel possessed any basis for moving to suppress Moore's confession to Raymond Moore or to Debbie Ziegler, or that counsel provided ineffective assistance by not moving to suppress those confessions. In any event, trial counsel's affidavit described Moore's confession to his brother and to Ziegler as

And even without the additional full confessions, the state still would have possessed powerful evidence of Moore's guilt, and both Moore and his attorney would have been aware of that fact. Trial counsel attached excerpts from a police re-

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"full," and the record contains evidence that Moore confessed to those two *before* he confessed to police. *See* Pet. Br. 40-43 (recounting evidence). The state court was entitled to read the record in that fashion, and to conclude that the confession to police did not somehow taint the prior confessions to Raymond Moore and to Ziegler.

Moore also notes that Ziegler told police, during the recorded interrogation, that "I still don't know the actual thing," and that Raymond Moore testified at the state post-conviction hearing that "I'm not sure of all the exact details because this is basically hearsay." Resp. Br. 5 (quoting J.A. 130 and 158). Moore thereby suggests that neither Ziegler nor Raymond Moore heard a "full" confession from Moore prior to the recorded confession that he made to police. But the state post-conviction court was not required to read the record as Moore does. Instead, it reasonably could infer that the quoted statements by Ziegler and Raymond Moore were nothing more than acknowledgements that, because they were not physically present when Moore killed the victim, they were forced to rely on others' accounts of the victim's death.

port to his affidavit. Ex. 120, Affidavit, Att. 3.[8] Those excerpts show that Moore—the day *before* his tape-recorded confession to police—made a number of extremely damaging admissions to police. *Id.* (report at 40-41). Moore admitted that, the day before the victim's body was discovered, he accompanied his co-defendants to the victim's home. *Id.* Moore admitted that they journeyed there for the purpose of confronting the victim about property he had taken from one of the co-defendants. *Id.* (report at 40). Moore also informed police that others were present when he and his co-defendants made their plan to confront the victim, and that others were present when Moore and the co-defendants arrived at the victim's home. *Id.* In addition, according to the same police report, Roy Salyer had already informed police that the murder weapon—a gun that Lonnie Woolhiser had purchased from the victim (App. 227)—likely was in a particular clump of blackberry bushes. Although officers had not yet found the gun when Moore made his tape-recorded confession, their discovery of the gun was inevitable. Ex. 120, Jordan Affidavit, Att. 3 (report at 39, 43).[9]

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[8] The cited attachment constitutes the final five pages of the affidavit's attachments.

[9] Officers called off their initial search of the bushes that contained the gun due to darkness. Ex.

Moore thus knew, when he decided to plead no contest, that his own admissions to police—admissions made prior to his tape-recorded confession—placed him at the victim's home the day before the victim's body was discovered, and established his motive to harm the victim. Moore also knew, when he pleaded no contest, that the state had discovered the victim's body and the murder weapon. And Moore had every reason to think that officers had talked to, or were in the process of interviewing, witnesses who saw him at the victim's house the day the victim disappeared, and witnesses who had heard Moore and his co-defendants plan to confront the victim.

Moore had no reason to believe that a successful motion to suppress his tape-recorded confession to police would have hampered the state's efforts to prosecute him for either felony murder or aggravated murder.[10] The state post-conviction

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120, Jordan Affidavit, Att. 3 (report at 39). They recovered the gun from those bushes when they resumed their search in Moore's company, following Moore's tape-recorded confession. Ex. 120, Jordan Affidavit, Att. 3 (report at 43).

[10] Indeed, co-defendant Roy Salyer (who went to trial) was convicted of murder, kidnapping, burglary, and assault, and—although Moore alone fired the fatal bullet—received the same total sentence that Moore received. App. 129 and n. 19.

court was not required to find that a suppression motion would have affected Moore's decision to plead no contest to felony murder.

3. Any mistake by counsel in assessing a suppression motion's merits did not "infect" his assessment of the state's other evidence.

Moore argues that "counsel's advice with respect to the plea question was infected and rendered incompetent by his mistaken assessment of the confession" to police. Resp. Br. 42-43. Moore may mean to suggest that the state post-conviction court, in rejecting Moore's prejudice claim, should not have relied on counsel's affidavit, or relied on counsel's belief that even a successful suppression motion would have been "unavailing." This Court should reject that suggestion.

As counsel's affidavit demonstrates, his advice about Moore's prospects at trial was not based exclusively on his opinion that a suppression motion would be denied. Instead, counsel articulated an additional and independent reason—aside from the motion's legal merits—for believing a motion would be futile. Even if a motion to suppress was granted, counsel believed that the state would possess overwhelming evidence that Moore had committed, at the least, felony murder. *See* App. 70 (containing counsel's statements that,

"[i]n addition" to believing that a motion would be denied, "Moore and I . . . concluded that [a motion] would be unavailing" because "he had previously made a full confession to his brother and to Ms. Ziegler, either one of whom could have been called as a witness at any time to repeat his confession in full detail"). As the record demonstrates, counsel's assessment of the state's remaining evidence was accurate. Nothing suggests that counsel's assessment was at all affected, much less "infected," by his assessment of a suppression motion's legal merits.[11]

CONCLUSION

Fulminante's direct-review harmless-error holding does not apply to the *Strickland* prejudice inquiry in a case like this. It simply provides no

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[11] Moore notes that the state did not appeal the federal district court's conclusion that Moore's confession to police was unconstitutionally obtained, and that the Ninth Circuit described the state as "conce[ding]" the confession's inadmissibility. Resp. Br. 1. Admittedly, the state did not appeal the admissibility issue, and it has not asked this Court to address the admissibility of Moore's confession to police. The state notes, however, that its tactical decision to proceed exclusively with a "no prejudice" argument should not be read as an "agreement" that the confession to police was inadmissible.

meaningful guidance when a federal habeas petitioner claims that counsel's failure to file a suppression motion affected his decision to forgo a trial and plead no contest. As a result, *Fulminante* provides no basis for concluding that the state post-conviction court—by rejecting Moore's prejudice claim—acted "contrary to," or unreasonably applied, "clearly established Federal law."

This Court should reverse the Ninth Circuit's judgment, and should hold that Moore is not entitled to federal habeas relief.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

JEFF PREMO, Superintendent,
Oregon State Penitentiary,

Petitioner,

vs.

RANDY JOSEPH MOORE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. a. If a collateral challenge is based on a defense attorney's decision not to move to suppress a confession prior to a guilty or no contest plea, does the *Arizona* v. *Fulminante* standard apply, even though no record of a trial is available for review?

b. Even if the *Fulminante* standard applies in that context, is it "clearly established Federal law" for purposes of 28 U. S. C. § 2254(d)(1)?

2. Did the Ninth Circuit err by granting federal habeas relief on Moore's ineffective-assistance-of-counsel claim?

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IN THE

Supreme Court of the United States

JEFF PREMO, Superintendent,
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Petitioner,

vs.

RANDY JOSEPH MOORE,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

This case involves a collateral attack on a plea-bargained conviction by a defendant who is certainly guilty of the crime of which he was convicted and is probably guilty of a greater degree of that offense. The ground of attack is supposedly ineffective assistance of counsel by an attorney who obtained this favorable plea bargain rather moving to suppress the defendant's confession, in circumstances where it is unlikely the motion would have been granted and unlikely the defendant would have obtained a more favorable result even if it were granted. Further, defendant's claims were reviewed by the state courts and found to be without merit.

The criminal law needs finality to perform its function, and exceptions should be made only in extreme circumstances involving a miscarriage of justice. This defendant received a more than fair disposition of his case. For a federal court of appeals to overturn the reasonable decision of the state courts under the circumstances of this case is contrary to the rights CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts of this case are stated in detail in the Brief for Petitioner. We summarize them here to frame the issues discussed in this brief.

> "Randy Moore and others beat Kenneth Rogers until he bled, stripped him, bound him in duct tape, placed him in the trunk of a car, drove him to a remote location, and forced him to march up a hill at gunpoint. While marching Rogers through the woods, Moore shot Rogers—accidentally, he said—through the temple." *Moore* v. *Czerniak*, 574 F. 3d 1092, 1136 (CA9 2009) (Bybee, J., dissenting).

Given the location and direction of the fatal wound, the fact it was a partial or complete contact wound, and the fact that the gun used had to be cocked before it would fire, Moore's claim of accidental shooting is very doubtful. See *id.*, at 1142, n. 7 (dissent); App. to Pet. for Cert. 226-227 (prosecutor's statement of factual basis at plea hearing).

Two weeks later, on December 20, 1995, Moore went to the police station, where he was interviewed while accompanied by his brother Ray Moore, a friend named Debbie Ziegler, and two other suspects in the case, Lonnie Woolhiser and Roy Salyer. See App. to Pet. for Cert. 173-174 (Federal Magistrate Judge's Findings and Recommendation). Moore was expressly told he was not under arrest. Moore stated he wanted an attorney at one point but then decided to proceed with the interview without counsel. See App. to Pet. for Cert. 175.

The detective made a number of statements such as, "Okay, so that you know you're going to get a fair shake from us alright, I want to verify that with our DA that he is not going and turn around and jam you." App. to Pet. for Cert. 175. Moore later stated that he understood the detective's statements to mean, "that if it was an accident, they would go before the D.A. on my behalf and see to it that I was charged with an accident." Supp. App. to Brief in Opposition 18 ("Supp. App.").

Moore was charged with murder. His attorney, Kim Jordan, did not move to suppress his statement but negotiated a plea bargain of no contest to felony murder with a sentence of 25 years in prison followed by parole for life. The information that Moore did not contest stated only that he kidnapped the victim and caused his death. There is no allegation of intent to kill. See App.

to Pet. for Cert. 215. The sentence was summarily affirmed on direct appeal. Brief for Petitioner 4-5.

Moore filed a *pro se* petition for postconviction relief, received by the state court on June 4, 1998. This was followed by an amended petition prepared by counsel on June 4, 1999. The allegations of the counseled petition are quoted in the state postconviction court's findings. See App. to Pet. for Cert.199-200. Both the *pro se* and counseled petitions make numerous allegations against the effectiveness of trial counsel. With regard to the petitioner's confession, both petitions merely allege that counsel failed to file a motion to suppress without specifying the grounds for suppression.

Between the *pro se* and counseled petitions, on February 26, 1999, trial counsel executed an affidavit in response to the allegations of ineffective assistance. The affidavit is reproduced in the Court of Appeals' opinion. 574 F. 3d, at 1122-1129; App. to Pet. for Cert. 69-77. The affidavit responds to the allegation regarding the motion to suppress in two paragraphs. Paragraph 3 is primarily addressed to the *Edwards* v. *Arizona*[2] issue and states that counsel did not believe the motion to suppress would be meritorious because petitioner was not in custody at the time of interview. The paragraph also mentions that counsel believed that Moore's statement was voluntary. In Paragraph 4 of the affidavit, counsel explains that even if he had succeeded in suppressing the confession, it would have been unlikely to produce a better result for the client,

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2. 451 U. S. 477 (1981). *Edwards* is evidently the issue petitioner referred to in his deposition as the "Brightline rule" he read about in the prison law library. See Supp. App. 23. The problem is that the *Edwards* line is not nearly so bright when custody is disputed. See *Thompson* v. *Keohane*, 516 U. S. 99, 112-114 (1995) (fact-intense inquiry with general standard).

because Moore had also confessed to two other people. On March 1, 2000, over a year after trial counsel's affidavit, postconviction counsel filed a trial memorandum advancing the theory that trial counsel should have moved to suppress on the ground that the statement was involuntary because of a supposedly unlawful inducement offered by the interrogating officers, in addition to the *Edwards* ground.

The state postconviction court denied the petition. The court found that the defendant was not in custody at the time he made his statement, see App. to Pet. for Cert. 201-202, 205, making *Edwards* inapplicable. The court did not expressly address the inducement claim, but it did make a finding "that there is very little chance the petitioner's confession would have been suppressed." See App. to Pet. for Cert. 205. The court also found that "[a] motion to suppress would have been fruitless" because of Moore's confessions to other persons. App. to Pet. for Cert. 205. Applying the standard of *Strickland* v. *Washington*, 466 U. S. 668 (1984), to the facts found, the state court found that Moore had not been denied his right to effective assistance of counsel. The state appellate courts summarily denied review.[3] Brief for Petitioner 13.

On federal habeas, the Magistrate Judge rejected the claim that counsel should have moved to suppress under the *Miranda/Edwards* rule, upholding the state court decision that Moore was not in custody. See App. to Pet. for Cert. 187-188. The Magistrate Judge found that the suppression motion would have merit on the

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3. The "look-through" rule of *Ylst* v. *Nunnemaker*, 501 U. S. 797 (1991), was established in a procedural default case predating the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), but the reasons for the rule, see *id.*, at 803-804, seem equally applicable to the "deference" standard of AEDPA, 28 U. S. C. § 2254(d).

voluntariness ground, although she did not apply § 2254(d) to the state court decision in this point. See App. to Pet. for Cert.188-190. No application of that standard was necessary because Moore's confession to his brother and Ms. Ziegler, along with other evidence available to the prosecution, meant that counsel's performance was adequate and also negated any prejudice. See App. to Pet. for Cert. 190-192. The District Court adopted the recommendation, see App. to Pet. for Cert. 194-196, and Moore appealed.

The District Court's decision was reversed by a divided panel of the Court of Appeals, that court denied rehearing en banc, and this Court granted a writ of certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals made a fundamental error by taking the merits of a suppression motion as given and evaluating counsel's performance on that basis. *Strickland* v. *Washington* is very clear that strategic decisions of defense counsel must be evaluated on the basis of circumstances known at the time. That rule is not altered by the omission of an argument from a brief filed by the state in federal habeas proceedings years later. At the time of trial counsel's decision, he had to assess the probabilities of whether a motion would be granted or denied and whether a grant or denial would significantly improve or significantly worsen the probability of an outcome better than one he was able to obtain through a plea bargain.

The Court of Appeals also erred in placing excessive weight on the cursory statement in trial counsel's affidavit. In particular, the fact that the affidavit does n liscuss in detail the various strategic considerations d ribed in the dissenting opinion does not mean that

counsel did not consider them or that a court may not consider them when evaluating counsel's performance. The affidavit was prepared at an early stage in the proceedings, not in response to detailed, fully developed briefing of the case. In any event, it would be dangerous to establish a practice of giving conclusive weight to the statement of the State's erstwhile adversary when the State must defend the adversary in order to defend its judgment.

In the circumstances of this case, the state postconviction court reasonably found, as a fact, that "there is very little chance that petitioner's confession would have been suppressed." The statements of the police during questioning that they would not "jam" Moore if he told the truth are reasonably understood as a promise not to overcharge him, not a promise to undercharge him. Moore himself expressed that he understood that he would be charged with the accidental death of Rogers if he made a statement confessing to accidentally causing Rogers' death. That is exactly what he was charged with. Accidental death during a kidnapping is felony murder in Oregon, and that was the charge. There was no false promise here.

The state court decision was well within the bounds of reasonableness on the performance prong of *Strickland* as well as the prejudice prong. Under 28 U. S. C. § 2254(d), Moore is not entitled to relief.

ARGUMENT

In its petition for certiorari in this matter, the State posed two questions. The first question has to do with the Court of Appeals' invocation of the standard of harmless error on direct review in *Arizona* v. *Fulminante*, 499 U. S. 279 (1991), as the "clearly established" law governing an assessment of whether

trial counsel's failure to make a motion to suppress resulted in "prejudice" within the meaning of *Strickland* v. *Washington*, 466 U. S. 668 (1984). No further briefing on this point is required, as the dissenting opinion in the Court of Appeals and the Brief for Petitioner are more than sufficient. *Amicus* CJLF will therefore not add to the briefing on this point. See Supreme Court Rule 37.1.

The second question asks more broadly, "Did the Ninth Circuit err by granting federal habeas relief on Moore's ineffective-assistance-of-counsel claim?" Even after the *Fulminante* issue is disposed of, there remain significant errors in the Court of Appeals' approach that could cause substantial damage in future cases if not corrected. This brief will therefore address these other issues.

I. Counsel's performance must be judged on probabilities known at the time, not holdings or concessions made years later.

A. The Waiver Issue.

Respondent Moore contends that the merits of the suppression motion, *i.e.*, whether his confession was actually admissible, is not properly before this Court because the State did not make that specific argument in its brief on appeal to the Court of Appeals. See Brief in Opposition 20. This is incorrect for several reasons.

Earlier in the same document, Moore notes, "*Strickland*, *Hill*, and *Kimmelman* require an assessment of the viability of a motion that was not filed in order to determine whether an attorney's performance fell below an objective standard of reasonableness." Brief in Opposition 12. That is correct, as further explained in Part I-B, *infra*. This makes the assessment a " 'pred-

icate to the intelligent resolution of the question presented,' " *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996), which is whether the *Strickland* claim was reasonably decided by the state court. Indeed, Moore's own statement of the first question before this Court is, "Whether . . . he would not have entered a plea of no contest if his attorney had filed a *meritorious* motion to suppress statements." Brief in Opposition i (emphasis added). Whether the motion would have been meritorious is necessary to the resolution of this question, just as the lawfulness of the continued detention was necessary to the resolution of the question in *Robinette*, whether a *lawfully* detained motorist must be given warnings before consent to search.

A second reason why this question is properly before the Court is that, notwithstanding its waiver holding, the Court of Appeals went ahead and decided the issue in the alternative. See *Moore*, 574 F. 3d, at 1103, n. 10. The requirement is that the issue be raised *or* decided below, in the disjunctive. See *Cohen* v. *Cowles Media Co.*, 501 U. S. 663, 667 (1991); *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 379 (1995); E. Gressman, *et al.*, Supreme Court Practice 464 (9th ed. 2007).

Third, the point that counsel was justified in not making the motion because the motion was unlikely to be granted is an argument in support of the question presented, not a distinct question. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992).

B. The Probabilities Facing Trial Counsel.

The Court of Appeals approached the question of counsel's performance in a highly artificial way, taking as given that Moore's confession would have been suppressed if counsel had so moved, then effectively collapsing the performance and prejudice prongs of the ineffective assistance inquiry into the single question of whether suppression would have made a difference. See 574 F. 3d, at 1101-1102. The reason for taking the success of the motion as given is that the State did not specifically dispute, on Moore's appeal from denial of federal habeas relief over a decade after the plea bargain, "that a suppression motion would have been meritorious." *Id.*, at 1101. One would be hard pressed to find a better example of a holding contrary to the admonition of *Strickland* v. *Washington*, 466 U. S. 668, 689 (1984): "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."

Strickland stated the test for an ineffective assistance claim in its most general form this way:

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the

defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687.

The merits of a suppression motion in this case, viewed in hindsight, are directly relevant to the second prong, reliability of the result. While the second prong is usually tested by asking if there is a reasonable probability the result would be different, *id.*, at 694, there are limits to the applicability of this test. A reasonable possibility of jury nullification cannot supply the needed prejudice. See *id.*, at 695. Also, *Lockhart* v. *Fretwell*, 506 U. S. 364, 369-370 (1993), held that if an objection can be seen in hindsight to lack merit, then failure to make it does not constitute prejudice for the purpose of *Strickland*, even if the court at the time would have granted it. Hence, when a habeas petitioner claims counsel should have made a particular motion, the merit of the motion judged in hindsight is a necessary condition for relief, but it is not sufficient.[4]

In the present case, the defendant, on advice of counsel, agreed to a plea bargain to felony murder in a case where he could readily have been charged with aggravated murder, a greater offense. The claim is that counsel should have made a motion to suppress defendant's confession prior to agreeing to the bargain. The advisability of doing so must take into account the probabilities of three unknown events: (1) whether the trial court would have granted or denied the motion; (2)

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4. Another possible limit on the probability-of-different-result test is Justice Powell's thesis that counsel's failure to suppress reliable but illegally obtained evidence is never *Strickland* "prejudice." See *Kimmelman* v. *Morrison*, 477 U. S. 365, 391 (1986) (concurring opinion); see also *Fretwell*, *supra*, at 372 (citing *Kimmelman* concurrence). In this case, as in *Kimmelman*, *supra*, at 391, the issue has not been raised by the parties or decided below and hence need not be decided by this Court, but it should be reserved for a future case.

whether parties could have reached a bargain after the court's ruling or whether the case would have gone to trial; and (3) what bargain they could have reached or what the outcome of trial and sentencing would have been. These sequential possibilities produce a tree. Simplifying the outcomes somewhat, it would look something like this:

A. The motion is granted.
   (1) The parties are able to reach a bargain.
      (a) Aggravated murder with a life sentence.
      (b) Felony murder with a 25-year sentence.
      (c) Some lesser offense and sentence.
      (d) Dismissal.
   (2) The case goes to trial.
      (a) Aggravated murder with a death sentence.
      (b) Aggravated murder with a life sentence.
      (c) Felony murder with a 25-year sentence.
      (d) Some lesser offense and sentence.
      (e) Acquittal.

B. The motion is denied.
   (1) The parties are able to reach a bargain.
      (a) Aggravated murder with a life sentence.
      (b) Felony murder with a 25-year sentence.
      (c) Some lesser offense and sentence.
   (2) The case goes to trial.
      (a) Aggravated murder with a death sentence.
      (b) Aggravated murder with a life sentence.
      (c) Felony murder with a 25-year sentence.
      (d) Some lesser offense and sentence.
      (e) Acquittal.

Plea bargain with a death sentence has been omitted from the list of possibilities because very few defendants accept a plea bargain with the maximum sentence

available under state law.[5] Dismissal of charges by the prosecution upon grant of the motion is not actually a "bargain," but we include it under that branch for simplicity.

A plea bargain, like any other settlement, gives each party a certain result, avoiding the risk of a worse result at trial and forgoing the possible gain of a better result at trial. See Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2507 (2004); M. Heumann, Plea Bargaining: The Experience of Prosecutors, Judges, and Defense Attorneys 110 (paperback ed. 1981). Whether a plea bargain should be reached before making a motion depends, in large part, on counsel's assessment of the probabilities of the various outcomes. Before the motion is made, neither party knows whether it will be granted. A granted motion to suppress may strengthen the bargaining position of the defense if the evidence is important to the prosecution's case and cannot be replaced. On the other hand, a denied motion may weaken the bargaining position of the defense by removing the uncertainty that the evidence might be suppressed.

The first probability to be assessed, then, is whether the trial judge will grant the motion. If the merit or lack of merit of the motion is clear under established law, this probability may approach 100% for one outcome and 0% for the other, but if the motion falls in the range of reasonable disagreement, counsel must

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5. That is why in states with no death penalty, plea bargains to life in prison are uncommon. See Scheidegger, The Death Penalty and Plea Bargaining to Life Sentences, CJLF Working Paper 09-01 (Feb. 2009), http://www.cjlf.org/papers/wpaper09-01.pdf; Kuziemko, Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment, 8 Am. L. & Econ. Rev. 116 (2006).

weigh the likelihood of each outcome against its consequences. In the present case, success on the motion was not certain by any means, as discussed further in Part III.

If the motion were granted, what would be the likely outcome of the case? In this case, it is unlikely that if the case went to trial without Moore's confession to the police he would have been convicted of an offense less than felony murder. Not only did the prosecution have Moore's statements to two other people, but it also had cases against accomplices in the crime. See App. to Pet. for Cert. 191 (Magistrate Judge notes likely damaging testimony from Salyer). Counsel for the triggerman in a multiple-perpetrator homicide must be aware of the substantial possibility that the prosecution will make a deal with one of the lesser participants in return for testimony against the actual killer. Possibilities A(2)(a) and A(2)(b) in the tree above are quite substantial, and these outcomes are worse for the defendant than the bargain he actually struck, despite the grant of the motion. Possibility A(2)(c) is also large, and it is no better for the defendant than the bargain he actually struck.

What is the probability of outcomes A(2)(d) and A(2)(e), a successful motion to suppress followed by a trial with a verdict of an offense less than felony murder or an outright acquittal? Slim. That would only happen if the evidence the prosecution already possessed plus the evidence it could obtain would be insufficient to prove the elements of felony murder. As the Court of Appeals dissent notes, that is most unlikely. See 574 F. 3d, at 1145-1148.

What is the probability of outcomes A(1)(c) and A(1)(d), a successful motion to suppress followed by dismissal of charges or a plea bargain to an offense less than felony murder? Slim again. From the prosecu-

tor's summary of the evidence at the plea hearing, it is clear that he believes Rogers was tortured, App. to Pet. for Cert. 224, and that Moore killed him intentionally and not accidentally. See App. to Pet. for Cert. 225-226. In other words, he believed Moore was actually guilty of aggravated murder, and he could probably prove that to a jury, with or without Moore's confession. This is a major crime for a small county,[6] the kind a prosecutor is most unlikely to bargain down to an offense well below the one he believes occurred and believes he can prove.

Viewed objectively, from the standpoint of the probabilities a lawyer could estimate at the time, the probability of a more favorable outcome *even if* the motion to suppress were granted is far from certain. This probability must be further discounted by counsel's estimate of the probability that the motion *would* be granted to arrive at a small likelihood of net gain from making the motion.

Is there a downside to making the motion and having it denied? In the tree above, we can write off outcomes B(1)(c), B(2)(d), and B(2)(e) as having essentially zero probability. Moore's confession effectively convicts him of felony murder by itself. A prosecutor would not offer less, and a jury would not find less.

The most important risk of making the motion and having it denied is that the prosecutor might not remain willing to offer a plea to felony murder. He might instead move to the tougher position of insisting on aggravated murder and offering only to agree not to seek the death penalty. Is this is a significant risk?

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6. The case was sufficiently notorious that the suspects' pictures were in the local newspaper and on television. See Supp. App. 17.

One main reason people settle is to eliminate the risk of an uncertain outcome. See *supra*, at 13. With each significant issue resolved, there is one less risk to worry about and one less reason to bargain away the possibility of a more favorable outcome. For this reason, when the prosecutor believes a motion to suppress has a substantial chance of succeeding, it would be entirely rational to make a more generous offer before the motion is made and harden his position after the motion has failed.

On the other hand, people do not always act rationally. If a prosecutor believes that a motion is patently meritless, a natural emotional reaction is to harden in response to counsel's having made it. Empirical research confirms the existence of this effect. "The 'frivolous' motion and trial, then, call forth a prosecutorial response inconsistent with the mellowing hypothesis. Prosecutors extract penalties from defendants for pursuing this type of an adversary strategy, and the result is a disposition that exceeds the one prosecutors would have settled for had the case been plea bargained at an earlier stage." Heumann, *supra*, at 124.

Another reason people settle is to avoid the cost of litigation. With each battle fought, there is more sunk cost and less cost to be avoided by settling. This factor may not be large if the cost of litigating a motion is small compared to the cost of the trial, but it is cumulative to the other factors.

When we consider the possibilities as they would have appeared to a competent lawyer at the time, as *Strickland* requires, we see a range of possibilities quite different from the stark picture painted by the Court of Appeals majority. A grant of the suppression motion was not certain, a better result was not certain if it was granted, and a worse result was entirely possible whether the motion was granted or denied.

Considering the full range of possibilities, was the lawyer's decision to recommend the plea bargain to felony murder, without first making a motion to suppress, the right choice? Quite possibly, but that is not the question before this Court. Was the decision "within the wide range of reasonable professional assistance" such that it " '*might* be considered sound . . . strategy.' " *Strickland*, 466 U. S., at 689 (emphasis added). Yes, but even that is not the question before this Court. That was the question before the state postconviction court. The question before this Court is whether the state postconviction court's decision on that question is so far beyond the pale as to be an unreasonable application of *Strickland*. See *Knowles* v. *Mirzayance*, 556 U. S. __, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251, 262 (2009). The answer to *that* question is clearly no.

II. The Court of Appeals erred in placing excessive weight on the affidavit of trial counsel.

The Court of Appeals majority in this case placed heavy weight on the affidavit of trial counsel.

> "In his affidavit, Moore's trial counsel stated two reasons *and two reasons only* for his decision not to file a motion to suppress (or, as counsel put it, his reasons for not filing a motion were 'two-fold'): First, counsel believed that such a motion 'would be unavailing'—i.e., not meritorious—because Moore 'was not in custody at the time he gave the recorded interview and . . . the statement was voluntary.' Second, counsel believed that, even if a motion to suppress Moore's confession were meritorious, filing it would make little difference because Moore 'had previously made a full confession to his brother and

> to Ms. Ziegler, either one of whom could have been called as a witness at any time to repeat his confession in full detail.' We hold that both of counsel's reasons for not filing the motion—that the motion was not meritorious on either ground, and that, even if it were, it would have served no purpose because of the other confessions—were erroneous." *Moore* v. *Czerniak*, 574 F. 3d 1092, 1102 (CA9 2009) (emphasis added).

Placing excessive weight on the statement of trial counsel is problematic as a general matter and as applied in this case.

Courts considering ineffective assistance claims must constantly bear in mind the difficult position of the State. In most claims attacking a criminal judgment, the State is defending the actions of a state actor: the police, the prosecutor, or the trial judge. When litigating an ineffective assistance claim, the State must defend the actions of its previous adversary. The judgment that the State is trying to protect is frequently one that trial counsel did his best to prevent. Reactions to ineffective assistance claims vary among trial defense attorneys. Some vigorously defend the quality of their representation, while others fall on their swords in a last ditch attempt to benefit their former clients. One attorney/blogger has this attitude:

> "The defendant's conviction depended on finding a new way to get into court, a new error to blame. I offered myself to the effort. In a case like this, a thousand different decisions are made which, in retrospect, could have gone either way. My position is that my representation must, by definition, have been ineffective given the outcome. My client was convicted; my job was to win an acquittal. I did not do my job well enough.

> "Much time and thought went into detailing and cataloguing things that could have changed the trial. It's easy to play Monday morning quarterback, but it's also necessary and proper to do so when it comes to a trial. We're lawyers. We're not perfect. If we've made a mistake, our clients should not have to suffer for it. More to the point, our clients should not have to suffer for our egos, and desire to pretend that our decision-making was perfect, beyond reproach.
>
> "Reproach me. If that can save my client, then call me any name in the book.
>
> "Many times, I've urged lawyers to shove their egos down their throats and take it like a man when a client claims ineffective assistance of counsel. They can't do it. It's partially because they can't admit that they might ever be wrong, and it's partially because they can't stand the thought that their name might appear next to a question of their abilities. Suck it up, children. It's not about you, but the guy who's sitting in a prison cell.
>
> "I help write up the list of things I did wrong." Scott Greenfield, Walking the Walk, Simple Justice: A New York Criminal Defense Blog, http://blog.simplejustice.us/2010/05/26/walking-the-walk.aspx (as visited June 22, 2010).

This post is remarkable in several respects. One is the view that an adverse result plus less than perfect representation are sufficient to establish ineffective assistance. *Strickland* is clearly to the contrary. See 466 U. S., at 693.

More specific to the present issue, this post reflects a view that it is the duty of trial counsel to affirmatively assist the attack on the adequacy of his own representation, even to the point of ridiculing those attorneys who

defend the quality of their own work, calling them "children." While the author's attitude is not universal, it is also not rare, particularly in capital cases.

For this reason, courts have long known to take trial counsel's statements with a pinch of salt. "Self-proclaimed inadequacies on the part of trial counsel in aid of a client on appeal are not persuasive. . . . To hold otherwise would render complaints of inadequate representation 'a "boudoir defense," unchallengeable by the prosecution. . . .' " *People* v. *Beagle*, 6 Cal. 3d 441, 457, 492 P. 2d 1, 11 (1972) (quoting *People* v. *Cuevas*, 250 Cal. App. 2d 901, 907, 59 Cal. Rptr. 866, 11 (1967)) (second ellipsis in original).

The Montana Supreme Court followed *Beagle*'s admonition in *State* v. *Trull*, 332 Mont. 233, 238, 136 P. 3d 551, 556 (2006), a case where trial counsel engaged in a remarkably prompt act of sword-falling, making a new trial motion on the ground that her own failure to ask for a continuance upon learning of new evidence constituted ineffective assistance. The court "review[ed] this claim on direct appeal in light of counsel's post-trial motion and affidavit in which she posits that she had no justifiable reason for not seeking the continuance," and found that proceeding with the trial under the circumstances was indeed "within the wide range of reasonable and professional assistance," *id.*, at 239-240, 136 P. 3d, at 557, despite counsel's own declaration to the contrary.

Even when trial counsel is not actively assisting the attack on his own performance, his participation in defending it may be limited. Collateral review may come many years after the trial, after the trial lawyer has moved on to a new stage of his career, and a finding of ineffective assistance in a case from long ago may not have any impact on his reputation or prospects for further advancement.

In the present case, trial counsel did sign one affidavit, evidently prepared very early in the collateral proceedings in this case. The affidavit appears to have been drafted in response to the petition, which merely alleges counsel failed to file a motion to suppress without stating the grounds. See *supra*, at 4. Not surprisingly, the explanation given for not making the motion is perfunctory. See 574 F. 3d, at 1104-1105, n. 12. The Court of Appeals majority's assumptions that the reasons stated in the affidavit are exhaustive and its inference that counsel did not consider anything not stated in the affidavit, see *id.*, at 1104-1105, are not logically valid.

The majority opinion says, "At no time did counsel suggest that he did not file the motion to suppress because he was concerned about the effect that doing so would have on Moore's plea deal or for any other 'strategic' reason . . . ." *Ibid.* The opinion evidently considers this omission conclusive on the question of whether such strategic considerations may be considered in the *Strickland* analysis. But counsel's affidavit merely explains the primary reasons why he believed there was very little upside to making the motion and does not discuss the possible downside. It does not follow that there is no downside, that counsel did not consider the downside, or that a proper analysis of the ineffective assistance claim cannot consider the downside.

When describing the method of adjudicating ineffective assistance claims, the *Strickland* Court spoke in objective terms. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." 466 U. S., at 690. This implies that objective conduct, not subjective thought process, is the focus.

This objective focus is consistent with the reason that we allow this unique procedure, where a party can attack the other party's judgment based on the failings of his own attorney, something no other litigant can do. The basic principle of *Strickland* on which all other rules are built is that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's *conduct* so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U. S., at 686 (emphasis added). Conduct itself, not the individual attorney's subjective reason for the conduct, is what makes a trial worthy of reliance or not. When strategic choices are at issue, then, the proper question is whether "the challenged action '*might* be considered sound trial strategy,' " *id.*, at 689 (quoting *Michel* v. *Louisiana*, 350 U. S. 91, 101 (1955)) (emphasis added), not an intrusive examination of what counsel actually considered. See *id.*, at 690 (warning against intrusive examination).

The dissenting judge in the Court of Appeals was entirely correct to weigh in the balance strategic considerations that could legitimately affect an attorney's decision to file a motion to suppress prior to negotiating a plea bargain. Whether the particular attorney in this case actually weighed these considerations would have only minimal relevance even if it were known, and the majority's inference from the affidavit that he did not is unjustified.

III. The state court reasonably found, as a fact, that "there is very little chance that petitioner's confession would have been suppressed."

The so-called "deference" standard for federal habeas review of state criminal judgments, 28 U. S. C. § 2254(d), provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

An "unreasonable application" of law under paragraph (d)(1) necessarily involves the application of law to facts. What facts? When the facts are genuinely disputed, a court must necessarily either determine them, a determination to which paragraph (d)(2) applies, or assume them in favor of the nonprevailing party.

In the present case, the state postconviction court made findings of fact and conclusions of law. See App. to Pet. for Cert. 201-207. The fact/law classifications are not necessarily the same as federal courts would make. For example, the court's determination that Moore was not in custody at the time of his confession comes under the "findings of fact" heading, even

though federal law classifies this holding as "a mixed question of law and fact." *Thompson* v. *Keohane*, 516 U. S. 99, 102 (1995).[7] The headings do not matter, though. Federal courts do not tell state courts how to write their opinions, see *Coleman* v. *Thompson*, 501 U. S. 722, 739 (1991), but they are also not bound by the state court's characterization of the holding. The latter proposition is implicit in *Thompson* v. *Keohane*, which pronounces the fact/law distinction to be "slippery" and then proceeds to decide it for all federal habeas proceedings without reference to the state court's characterization. 516 U. S., at 111.

While the question of whether Moore actually was in "custody" is a mixed question of law and fact, assessment of the probabilities of how another judge would have ruled on that question in response to a motion that was never made is a question of fact. A judge cannot decide a legal issue and assume that another judge would have decided it the same way.[8] The quintessential determination of fact is deciding "what happened." See *Thompson*, 516 U. S., at 111. However, applying *Strickland* sometimes requires assessment of the probabilities of outcomes of a course of action that was not taken. See 466 U. S., at 680-681. In that circumstance, a court must decide the probability that something would have happened, but that determination is not qualitatively different from the "what

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7. At the time of *Thompson*, that classification meant the question was determined de novo on habeas. See *ibid.* Now it means the determination is reviewed for reasonableness under § 2254(d)(1). The Magistrate Judge was incorrect in applying (e)(1) instead of (d)(1), see App. to Pet. for Cert. 188, but that choice is unlikely to have made a difference in the outcome.

8. If all judges decided legal questions the same way, Supreme Court Rule 10 would make no sense. Indeed, we would need no appellate courts at all.

happened" determination so as to call for a different classification.

The state postconviction court's determination that Moore was not in custody was a mixed question under *Thompson*, and it is reviewed under § 2254(d)(1) on federal habeas. The determination was reasonable. See App. to Pet. for Cert. 188 (Magistrate Judge's recommendation). Under *Lockhart* v. *Fretwell*, 506 U. S. 364 (1993), it follows that Moore was not prejudiced for the purpose of the *Strickland* test by counsel's failure to make a meritless motion.

The state postconviction court's determination that "there is very little chance that petitioner's confession would have been suppressed" by the trial court, App. to Pet. for Cert. 205, is a finding of fact. That determination is also reviewed for reasonableness on federal habeas, although under § 2254(d)(2).[9] This determination is also more than reasonable. It is highly probable that the trial court would have rejected the *Edwards* claim on the ground that Moore was not in custody, for the same reasons the postconviction court and the Federal District Court rejected it. It is also highly probable that the trial court would have rejected an "involuntariness" claim based on how a reasonable person would have interpreted the statements of the police.

Shortly before the crime in this case, the Oregon Court of Appeals summarized the test for determining when a confession would be deemed involuntary on the ground that it was made in response to an inducement. "If a person in the defendant's circumstances reasonably would have believed that the officer was promising

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9. The relation between (d)(2) and (e)(1) is discussed in CJLF's brief in *Wood* v. *Allen*, No. 08-9156, available at http://www.cjlf.org/briefs/WoodH.pdf.

immunity and reasonably would have relied on that promise in making the confession, then the confession is considered to have been induced by the promise of immunity and *as a matter of law* is involuntary and must be suppressed." *State* v. *Aguilar*, 133 Ore. App. 304, 307-308, 891 P. 2d 668, 670 (1995) (emphasis in original).

This test is not contrary to the clearly established precedents of this Court and may even be more favorable to the defendant. The federal constitutional question is whether "his will has been overborne and his capacity for self-determination critically impaired." *Culombe* v. *Connecticut*, 367 U. S. 568, 602 (1961). That question must be evaluated under the "totality of all the circumstances" and not "the presence or absence of a single controlling criterion." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226 (1973). The old statement of *Bram* v. *United States*, 168 U. S. 532, 542 (1897), that " 'any direct or implied promises, however slight' " are sufficient to invalidate a confession, is no longer the law. See *Arizona* v. *Fulminante*, 499 U. S. 279, 285 (1991).

A leading treatise notes a number of cases finding confessions to be involuntary because of promises of leniency but then says, "although in recent years there has been a movement away from treating such promises of leniency as *per se* producing involuntariness, especially in light of *Fulminante*'s reading of *Bram*." 2 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 6.2(c), p. 625 (3d ed. 2007).

Among the authorities cited for this trend is *United States* v. *Flemmi*, 225 F. 3d 78 (CA1 2000), in which the First Circuit held, "The mere fact that an unfulfilled promise was made in exchange for a person's statement does not constitute coercion, rendering the statement involuntary or its fruits inadmissible." *Id.*, at 91. In

State v. *Unga*, 165 Wash. 2d 95, 105-106, 196 P. 3d 645, 651 (2008), the court applied a totality of circumstances test for voluntariness, rejecting the concurring opinion's position that the mere fact of a promise was determinative. "The problem for the concurrence is that the rule in *Bram* was jettisoned in *Fulminante*." *Id.*, at 113, 196 P. 3d, at 654. Under a totality of circumstances analysis, the fact that Moore was questioned surrounded by his family and friends, not in isolation, would weigh heavily against a finding of involuntariness. Cf. *Miranda* v. *Arizona*, 384 U. S. 436, 449-450 (1966).

The Court of Appeals majority interprets the police officers statements that they would "go to bat" for Moore if he told the truth, along with references to his brother's case in which charges were dropped, as promises to give Moore immunity or at least charge him with something less than murder. See 574 F. 3d, at 1103, n. 10. This interpretation is not credible. In the brother's case, he said the killing was self-defense, not a crime at all, and that statement was apparently believed. See 574 F. 3d, at 1095. In other words, the brother made a statement, the statement was deemed to be true, and he was not charged with anything *more* than he confessed to, which was justifiable homicide and not a crime at all. A reasonable person would not infer by analogy that speaking to the police would result in being charged with *less* than the crime confessed to. Similarly, the police statements that they would "go to bat" for Moore and not "jam" him are reasonably interpreted to be promises not to *over*charge him rather than promises to *under*charge him.

In this case, we also have the habeas petitioner's testimony as to what he thought the officers had promised him. Far from establishing his case of a false promise of leniency, his own testimony refutes it.

> "About where the detectives told me that if it was an accident, they would go before the D.A. on my behalf and see to it that I was charged with an accident. And when he did go to the D.A. to ensure the D.A. didn't jam me for later on down the road, he came back. And then after we told him those statements, they charged us with murder anyhow." Supp. App. to Brief in Opposition 18.

Moore himself unmistakably states that he was not expecting that a truthful statement of what happened would result in his being charged with less than the crime he admitted to. He thought that if he stated that the death of Rogers was accidental, then he would be charged with accidental death. He was not promised leniency, much less immunity. He was promised he would not be overcharged.

So understood, the promise was kept. Moore's statement confessed to all the elements of felony murder, which does not require proof of intent to kill. See Brief for Petitioner 51. He was not "jammed," *i.e.*, charged with any greater offense. Clearly, Moore was greatly surprised to learn that his dubious statement[10] of accidental shooting was actually a confession to murder under Oregon's felony murder rule. However, matters internal to the defendant's mind do not convert proper police conduct into coercion. See *Colorado* v. *Connelly*, 479 U. S. 157, 170 (1986). Moore expected he would be charged with the accidental death of Rogers, and he was. It is the felony murder law, not a breach of promise by the police or prosecutors, that makes this charge "murder anyhow."

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10. Moore probably did not keep his part of the bargain to tell the truth, as the claim of accidental shooting is probably a fabrication. See *supra*, at 2-3.

While the state postconviction court did not specifically address the merits of the inducement claim, that claim was briefed as part of the motion-to-suppress argument, and the court held that there was "very little chance" the motion would have been granted. See App. to Pet. for Cert. 205. This holding is a reasonable one for the purpose of § 2254(d). Counsel's actions must therefore be judged, as explained in Part I, with a premise of a strong probability the motion would have been denied. Given that probability, counsel's actions were easily within the wide range permitted under *Strickland*. The state postconviction court's "bottom line" holding under *Strickland*, App. to Pet. for Cert. 206, is well within the bounds of reasonableness sufficient to preclude relief under § 2254(d)(1).

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

July, 2010

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
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No. 09-658

In the Supreme Court of the United States

Brian Belleque, Superintendent, Oregon State Penitentiary, *Petitioner,*

vs.

Randy Joseph Moore, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE SOUTH CAROLINA, ALABAMA, ALASKA, ARIZONA, COLORADO DELAWARE, IDAHO, INDIANA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MONTANA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, TEXAS, VIRGINIA, WISCONSIN AND WYOMING IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state murder conviction based on a plea agreement may be invalidated on collateral review simply because trial counsel recommended pursuing the plea rather than moving to suppress one of the defendant's multiple confessions.

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INTRODUCTION AND INTERESTS OF AMICI CURIAE

Amici States strongly oppose the Ninth Circuit's effort to dilute the standards for invalidating pleas entered in state court. Because "the vast majority of criminal convictions result from pleas," the "concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." *United States v. Timmreck*, 441 U.S. 780, 784 (1979). And that concern for finality has even greater force when federal courts reopen convictions issued and affirmed in state court. Finality and comity "demand[] that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). But the Ninth Circuit's decision dispensed with all such deference.

Under the Ninth Circuit's approach, a defense counsel's failure to move to suppress a confession before a defendant enters a plea has committed *per se* ineffective assistance for purposes of federal habeas relief whenever the motion is potentially meritorious regardless of the context, other evidence and strategic considerations. In other words, an attorney who declines to file a motion to suppress one confession in favor of advising his client to take a plea in light of a second confession (or even a third!) has provided guidance that is objectively unreasonable and prejudicial to the defendant, and therefore requires invalidation of the plea as involuntary.

This Court has never articulated such an expansive standard for invalidating pleas in state court. To the contrary, in the context of a plea bargain, the prevailing standard is whether a reasonably competent attorney would have advised the defendant differently in light of the evidence at hand, and, if so, whether that would have led the defendant to pursue a trial rather than a plea agreement. *See Hill v. Lockhart*, 474 U.S. 52, 56-57,

59 (1985); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

Moreover, if this Court were to now adopt the Ninth Circuit's expansive standard, that ruling would seriously compromise the ability of all the States to negotiate legally-binding plea agreements with defendants. Any uncertainty about the finality of criminal convictions obtained by guilty pleas decreases the value of such a plea in the eyes of the States, resulting in fewer plea bargains and an upsurge in trials. And forcing the state to present its original evidence years after a plea, with all the pitfalls that come from long delays before trial – faded memories, lost physical evidence, missing witnesses – calls into question the value of plea negotiations on which the criminal justice system so heavily depends. At minimum, adoption of the Ninth Circuit's decision would dramatically increase the number of meritless suppression motions filed by fearful attorneys in state criminal proceedings. And all of these adverse practical effects would carry with them a corresponding drain on judicial, prosecutorial and budgetary resources.

For these and other reasons explained below, *amici* urge the Court to reject the Ninth Circuit's approach, and reverse its decision.

STATEMENT OF THE CASE

Habeas petitioner Randy Moore seeks to invalidate his plea of no contest for the assault, kidnapping, and murder of Kenneth Rogers. With the help of two others, Moore beat Rogers; stripped him; bound him with duct tape; placed him in the trunk of a car; drove him to a remote location; blindfolded him; marched him up a hill; and shot him at point blank in the temple. Moore was the triggerman, though he claims the shooting was an accident. *Moore v. Czerniak*, 574 F.3d 1092, 1097, 1137 (9th Cir.

2009). He confessed these facts three times, and he pleaded no contest in exchange for a 25-year sentence. *Id.*

1. Moore first confessed to his brother Raymond, seeking advice and an escort to the police station. During the state court post-conviction evidentiary hearing, Raymond testified that, before driving Moore and Salyer to the police station, or on the way, Moore described how he, Salyer and Woolhiser went to the victim's home to confront him about stealing property from Salyer's residence. *Id.* at 1146. They assaulted, blindfolded and duct taped Rogers, placed him in the trunk of their vehicle and drove to a remote area. *Id.* At that point, they removed him from the trunk and proceeded to walk and push him, blindfolded, up a hill. *Id.* Although they stated that they only intended to frighten the victim, Moore was holding the revolver with his hands on the trigger when the gun discharged and the victim suffered the fatal gunshot wound. Id. In an affidavit the district court found credible, Moore's counsel confirmed that Moore acknowledged having made this confession to his brother Raymond. *Id.* at 1124. The confession was further corroborated by a conversation with police, in which Raymond confirmed that earlier in the day Moore and Salyer told him the full story as recounted to the officers. *Id.* at 1096-1097, 1102. Moore gave a similar full confession to Lonnie's girlfriend, Debbie Ziegler, who accompanied Moore to the police station. And Moore confessed for the third time to the police. Id. at 1124.

2. Subsequent to this third confession, Moore was appointed counsel. Counsel advised him that if he went to trial he could face an aggravated murder charge and a potential death penalty, and at minimum would be charged with murder, kidnapping and assault. In light of his three confessions and other evidence available to police, including the murder weapon, the duct tape and witnesses placing Moore at the scene of the kidnapping and the crime, Moore elected to accept a plea agreement characterized by experienced defense counsel as "the

best we could do under the circumstances." *Id.* at 1094, 1128, 1142. Moore was given twenty-five years imprisonment for the murder of Kenneth Rogers. *Id.* at 1097.

3. Moore unsuccessfully appealed his sentence to both the Oregon Court of Appeals and the Oregon Supreme Court. He then filed a petition for state post-conviction relief, raising a host of issues including that counsel provided constitutionally ineffective assistance by not moving to suppress Moore's confession to police. The Oregon court considered the affidavit testimony by Moore's defense counsel, which explained his reasons for not moving to suppress the third confession. The court determined that suppressing Moore's third confession would have been "fruitless" due to the facts of the case and Moore's two other confessions, and concluded that Moore failed to meet his burden to show that his plea was involuntary due to ineffective assistance of counsel. The Oregon Court of Appeals affirmed and the Oregon Supreme Court denied review. *Id.* at 1097-1098.

4. Moore proceeded to file a federal habeas petition, again alleging, among other things, ineffective assistance of counsel. The district court denied Moore's federal habeas petition, agreeing with the Oregon court's reasoning that even if a suppression motion would have been successful, the confession was redundant in light of Moore's two previous confessions. *Id.* at 1098-1099. In addition, though Moore alleged that his attorney should have moved to suppress his confession to the police, he offered no evidence to suggest that he would have insisted on going to trial if counsel had done so. Brief of Petitioner, p. 10. Moore reiterated his ineffective assistance of counsel argument on direct appeal to the Ninth Circuit. *Id.* at 1099.

In a divided decision, the Ninth Circuit reversed, concluding that the decisions of the Oregon courts were unreasonable under AEDPA. In a majority opinion by Judge

Reinhardt, the court invalidated Moore's no contest plea for ineffective assistance, on the theory that counsel's advice to avoid an aggravated murder charge by pursuing a plea deal for a lesser offense rather than moving to suppress Moore's third confession, was deficient. 574 F.3d 1092. Judge Reinhardt found the ineffective assistance analysis in this case to be governed by *Fulminante* – a decision that did not involve an ineffective assistance claim but rather held that one of two confessions actually introduced at trial was not harmless beyond a reasonable doubt. *Id.* at 1110-1114.

Judge Bybee dissented, explaining that "[t]he net effect of the majority's approach is pernicious." *Id.* at 1144. He identified two principal errors in the majority's reasoning. First, "[i]nstead of deciding whether counsel's conduct fell below an objective standard of reasonableness, the majority asks whether the motion had merit," and finds counsel ineffective in that event. Second, the majority adopted an "unprecedented reading of *Arizona v. Fulminante*," which treated a failure to suppress a second or third confession as necessarily prejudicial under *Strickland*. *Id.* Six judges on the Ninth Circuit dissented from the court's denial of a petition for rehearing en banc. *Id.* at 1162, 1166.

SUMMARY OF ARGUMENT

Surveying the practical consequences of *Strickland* nearly three decades later, this Court recently observed that the "'floodgates' concern" that some had expressed about that decision – the prospect of unsettling the finality of myriad criminal judgments – has not come to pass. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1484 (2010). The principal reason a "flood did not follow" *Strickland* or this Court's application of Strickland to guilty pleas was because "[s]urmounting Strickland's high bar is never an easy task." *Id.* at 1485. If adopted by this Court, however, the Ninth Circuit's approach would fling the floodgates wide open.

As we explain in Part I, the Ninth Circuit dramatically lowered the bar for habeas actions alleging ineffective assistance of counsel. And as we explain in Part II, the Ninth Circuit's lowering of the bar would invite meritless motions, strain the resources of courts and prosecutors, and ultimately redound to the disadvantage of criminal defendants.

ARGUMENT

I. The Ninth Circuit's Approach Effectively And Inappropriately Lowers The Burden Of Proof For Invalidating State Guilty Pleas In Federal Habeas Actions.

For good reason, a habeas petitioner alleging ineffective assistance of counsel faces an unusually high bar when attempting to invalidate a guilty plea voluntarily entered in state court. Specifically, as we explain below, the petitioner's burden contains three separate layers of deference designed to prevent federal courts from unduly interfering with the finality of state-court guilty pleas. But the Ninth Circuit's approach would destroy each layer.

A. Three layers of deference protect the finality of state guilty pleas and erect an unusually high bar for petitioners seeking to invalidate their pleas.

First, a defendant must demonstrate that his counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Because it is "all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence" (*id.* at 689), the "availability of intrusive post-trial inquiry into attorney performance * * * would encourage the proliferation of ineffective-ness challenges" (*id.* at 690). Courts must therefore "indulge a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

Second, a defendant must "affirmatively prove prejudice" (*id.* at 693) by showing "a reasonable prob-ability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at 694). Because courts "should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result" (*id.* at 697), only the most grievous errors will be "sufficiently serious to warrant setting aside the outcome of the proceeding" (*id.* at 693). The prejudice must thus be reasonably probable: "It is not enough for the defendant to show that the errors had some conceivable effect * * *" *Id.*

That burden, moreover, is even higher when a petitioner claims that counsel's advice prejudiced his voluntary decision to enter a guilty plea. In the plea context, the fundamental interest in finality is at its greatest, for "the vast majority of criminal convictions result from such pleas." *United States v. Timmreck*, 441 U.S. at 784 (quotation omitted). At the same time, the interest in reliability of convictions is at its weakest, for "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *Id.* (quotation omitted). Yet the judicial task of ascertaining prejudice is at its most difficult, for pleas are entered in the face of "inherent uncertainty" and determining the effect of counsel's advice or pre-plea activities "is a highly speculative matter in any particular case." *McMann v. Richardson*, 397 U.S. 759, 774 (1970).

For all of these reasons, a defendant who pleads guilty cannot establish prejudice unless he demonstrates "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In other words, counsel's error

must be the deciding factor in a defendant's decision to take a plea.

Third, even if a defendant can show ineffectiveness and prejudice, he faces an additional burden to prove that his counsel's ineffectiveness was so manifest and the error so prejudicial that no reasonable court could possibly deny his claim. Under AEDPA, a habeas petitioner "must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in the first instance." *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). Rather, he "must show that the [state court] applied Strickland to the facts of his case in an objectively unreasonable manner." *Id.* at 699.

This is a "highly deferential standard" entailing a "substantially higher threshold for obtaining relief than de novo review." *Renico v. Lett*, 130 S.Ct. 1855, 1862 (2010) (quotation omitted). It "demands that state-court decisions be given the benefit of the doubt." *Id.* (quotation omitted). And for good reason: In enacting AEDPA, "Congress intended federal judges to attend with the utmost care to state-court decisions." *Williams v. Taylor*, 529 U.S. 362, 386 (2000).

In sum, courts must use restraint when asked to second-guess the actions of counsel, to unsettle the finality of a plea, and to throw out the work of a state court. Under *Strickland* and AEDPA, this Court has consistently made clear that petitioners face a "high bar." *Padilla*, 130 S.Ct. at 1484.

B. At each level of analysis, the Ninth Circuit failed to exercise the deference this Court requires.

At each step, the Ninth Circuit's approach to Moore's claim dramatically lowered the bar. The Ninth Circuit held that Moore's counsel was ineffective simply because he declined an

opportunity to file a meritorious motion to suppress. The Ninth Circuit further held that counsel's failure to suppress the confession prejudiced Moore's decision to plead guilty, even though two other admissible confessions (and additional evidence) overwhelmingly established Moore's guilt. And on the basis of this reasoning, the Ninth Circuit held that the Oregon courts' denial of Moore's ineffective assistance claim was not only wrong, but unreasonable. Each of those three holdings was both wrong and pernicious.

1. The Ninth Circuit misapplied *Strickland* by deeming counsel ineffective for foregoing an inconsequential motion to suppress simply because the motion would have been granted.

Under *Strickland*, the first issue is whether it was "objectively unreasonable" for Moore's counsel to forgo an opportunity to suppress Moore's third confession before advising Moore to take a plea. Far from heeding the "strong presumption" that counsel's decision was reasonable, the Ninth Circuit applied what amounts to a *per se* rule that forgoing a suppression motion is always unreasonable, so long as the motion has merit. *Strickland*, 466 U.S. at 689.

The relevant facts surrounding counsel's decision were outlined in his affidavit, and are undisputed. Moore's counsel evaluated Moore's third confession in context of the other evidence against him, and concluded that suppressing the confession would have been futile. As counsel explained, Moore "had previously made a full confession to his brother and to Ms. Ziegler, either one of whom could have been called as a witness at any time to repeat his confession in full detail." The other evidence placed Moore at the scene of the killing, and it placed the weapon in his hand. From counsel's discussions with Moore and his evaluation of the evidence, "there was never the smallest

doubt" in his mind that the shooting "occurred during a kidnap which began with an assault." Moore's only viable defense was to claim that the actual shooting was an accident – hardly a viable defense to felony murder.

Against this mountain of evidence, counsel reasonably estimated that "if we went to trial [Moore] would be found guilty of assault, kidnapping, and [felony] murder." Counsel also estimated that this would have been the likely result if Moore went to trial with two confessions, just as it would have been the likely result if he went to trial with three. Suppressing the third confession was thus "unavailing." It was also premature, as Moore had not yet been indicted. And so, rather than awaiting indictment and then suppressing Moore's third confession, counsel negotiated a plea that was in his judgment "the best we could do under the circumstances."

Counsel's actions were eminently reasonable under the circumstances. But the Ninth Circuit found them unreasonable. This was not because it determined that suppressing the third confession could somehow have made an acquittal likely. Nor was it because suppression would significantly alter the plea negotiations. Rather, the Ninth Circuit found counsel's actions unreasonable principally because "a motion to suppress Moore's confession would have succeeded." 574 F.3d at 1107. Never mind that Moore was all but certain to be convicted at trial; the decisive fact for the Ninth Circuit was that he could have had his motion granted.

The Ninth Circuit's breathtaking willingness to deem counsel ineffective in these circumstances should be firmly rejected. It rests on a corrosive view of effective advocacy that those certain to lose the war must nevertheless wage every battle. And worse still, it treats such scorched-earth tactics as a defining feature of minimal attorney competence.

This Court has cautioned that the ineffective-assistance inquiry not be used to "restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689. To require that counsel pursue every tactical success, regardless of its strategic importance, would dramatically restrict counsel's latitude. It would effectively impose a "nothing to lose" standard for evaluating *Strickland* claims, whereby every defense must be pressed so long as there is nothing to lose by advancing it. This Court has already rejected such a standard: To forgo a defense, counsel "is not required to have a tactical reason-above and beyond a reasonable appraisal of a claim's dismal prospects for success." *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1422 (2009). That principle should be reaffirmed here.

A motion unlikely to change the outcome of a trial has "dismal prospects" for long-term success even if it is likely to be granted. And a reasonable appraisal of those prospects suffices to constitute effective representation. By treating the ineffectiveness inquiry as turning solely on a suppression motion's merit – rather than its ultimate usefulness – the Ninth Circuit improperly converted reasonable attorney judgment into objectively unreasonable ineffectiveness.

2. The Ninth Circuit misapplied *Strickland* and *Hill* by treating counsel's failure to suppress evidence as necessarily prejudicial to a plea simply because the evidence might have had some possible effect at trial.

Even if counsel's performance were somehow ineffective, Moore also had to prove that it prejudiced his plea. Under *Strickland*'s second prong (as extended by *Hill* to the plea context), the relevant inquiry in this case is whether there is a "reasonable probability" that a motion to suppress Moore's third confession would have so altered the nature of the bargain that he

would have rejected his plea and "insisted on going to trial." *Hill*, 474 U.S. at 59. Here again, the Ninth Circuit effectively replaced the *Strickland* standard with a *per se* rule: that suppressing Moore's third confession would probably have caused him to forgo his plea, simply because the confession would not have been harmless if admitted at trial. Put another way, the Ninth Circuit reasoned that if any evidence could have a possible effect on the trial, it has a probable effect on the plea. This is a startling non-sequitur, and an insidious one.

1. It should have been easy for the Ninth Circuit to see an absence of prejudice in this case. Moore's decision to avoid trial and plead no contest to felony murder was an inevitable consequence of the risks he faced. As explained above, it is undisputed that Moore participated in the events leading up to the shooting; it is undisputed that those events involved beating Rogers and forcing him from his home (bound, in the trunk of a car); and it is undisputed that Rogers ended up dead. Moore claimed only that he did not mean to pull the trigger. In light of the assault and kidnapping, the State's case against Moore for felony murder could hardly have been stronger. And so, the felony murder charge on which Moore was almost certain to be convicted was the charge to which he entered his plea.

Trial, however, could well have been much worse for Moore. He risked conviction for the greater offense of aggravated murder, against which his "accidental shooting" defense was a gamble. After all, Moore used a revolver, which must be cocked before discharging. And he shot Rogers in the temple. 574 F.3d at 1142 n.7 (Bybee, J. dissenting). Moreover, the State could have marshaled extensive evidence against Moore: the murder weapon, which they had recovered; the car, with blood and hair found in the trunk; the testimony of Moore's co-conspirators; the testimony of at least six witnesses to preparatory events preceding the crimes; and not least, Moore's two other confessions. *See id.* at 1145-1149.

Moore thus had a choice: He could plead guilty to felony murder, with a 25-year mandatory minimum, or he could risk conviction for aggravated murder, which carries a sentence of life imprisonment or death. On these facts, it is implausible to conclude that Moore would have gambled on trial if only he knew the evidence against him would include two confessions instead of three. Because there is no "reasonable probability" the third confession was the deciding factor in Moore's plea, counsel's failure to suppress it cannot have caused prejudice.

2. The Ninth Circuit reached a contrary result by effectively changing the law. The Ninth Circuit's approach conflated *Strickland's* prejudice standard with the different prejudice standard applied in *Arizona v. Fulminante*, 499 U.S. 279 (1991), a decision the Ninth Circuit treated as "a fortiori, controlling here." 574 F.3d at 1110. Yet *Fulminante* did not involve an ineffective assistance claim. And it did not involve a plea. Instead, the issue for this Court was whether to reverse a conviction where a coerced confession had been introduced at trial. In reviewing the prejudicial effect of the confession in that context, the Court had to decide whether the erroneously-introduced confession was "harmless beyond a reasonable doubt." 499 U.S. at 295. The Court held that the confession was not harmless, despite a second confession and other evidence introduced at trial.

Far from "controlling," *Fulminante's* conclusion that the second confession was not harmless has little relevance to *Strickland's* prejudice inquiry. To determine that a confession was not harmless beyond a reasonable doubt, a court need only conclude that it had some marginal effect at trial however small. But the fact that Moore's third confession might have had some marginal effect at trial does not answer the relevant question under *Strickland*: whether it was reasonably probable that the confession was the deciding factor in Moore's decision to take the plea. Although *Fulminante* and *Strickland* both use the word

"prejudice," they mean entirely different things by its use. *See United States v. Dominguez Benitez*, 542 U.S. 74, 81-82 & n.7 (2004). To reason from *Fulminante* to *Strickland* is thus to treat the possibility of prejudice as proof that prejudice was probable. This approach is as radical as it is illogical.

The distorting effect of the Ninth Circuit's *Fulminante* standard is even more readily apparent in the plea context. Because much uncertainty surrounds any decision to take a plea and because a plea prevents a trial record from ever being developed, assessing the impact of particular evidence necessarily entails speculation. *Fulminante's* standard, however, burdens the government with showing that evidence was harmless and treats mere uncertainty as reason enough to find prejudice so long as certain facts are "far from clear" or "the record falls far short." 574 F.3d at 1113. The Ninth Circuit's approach thus reverses *Strickland's* burden of proof, which has always required the petitioner to "affirmatively prove prejudice," *Strickland*, 466 U.S. at 693.

There is good reason, moreover, for it to remain more difficult to invalidate a plea than to reverse a conviction based on a confession used at trial. Unlike a conviction based on a coerced confession, "[w]hat is at stake in [the plea] phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting guilt and putting the State to its proof." *McMann v. Richardson*, 397 U.S. at 773.

The net consequence of the Ninth Circuit's approach is to make *Strickland's* "highly demanding" prejudice standard substantially less so. *See Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). Because nearly ever piece of evidence may have some possible effect if introduced at trial, and thus cannot be

harmless beyond a reasonable doubt, nearly every piece of evidence could give rise to an ineffective assistance claim.

3. The Ninth Circuit violated AEDPA by substituting its own view of the appropriate *Strickland* inquiry for that of the Oregon courts.

Even if it were possible under *Strickland* to reach the result the Ninth Circuit reached in this case, it cannot be that the contrary conclusions of multiple Oregon courts, the federal district court, and many dissenting judges of the Ninth Circuit were all simply "unreasonable under any standard." 574 F.3d at 1115. An "unreasonable application is different from an incorrect one," and AEDPA entitles the Oregon courts to significant deference, above and beyond the deference required by *Strickland*. *Bell*, 535 U.S. at 694.

Further, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Mirzayance*, 129 S. Ct. at 1420. The conclusion that suppressing Moore's third confession would have no great effect on his fortunes was well within the latitude of the Oregon courts to decide. By treating its own novel view of the *Strickland* analysis as the only reasonable one, the Ninth Circuit usurped Oregon's authority to ensure the fairness and finality of guilty pleas entered in its courts.

II. The Ninth Circuit's Attempt To Relax The Legal Standards For A Finding Of Ineffective Assistance In The Handling Of Confessions Would Have Serious Adverse Consequences For State Courts, Prosecutors And Budgets, With No Offsetting Benefit To Criminal Defendants.

If the decision below stands, moreover, experienced defense attorneys who believe a plea bargain is in the best interest of their clients will be forced to reject the prosecution's offer if they have a colorable motion to suppress some – but not all – of the evidence against their client. This standard would distort the legal advice available to defendants and introduce additional expenses and delays into already overstressed and underfunded state judicial systems right in the middle of a massive budgetary crisis when it is not realistic to hope that states will be able to expand their personnel and facilities to handle the additional demand.

A. The vast majority of criminal actions re-solved in state courts are resolved through confessions and plea agreements, and an increase in meritless suppression motions will drain already tight judicial, prosecutorial and budgetary resources.

Given the importance of plea bargains in our judicial system, such a change in the rules governing when lawyers may recommend them would impose enormous costs. Ninety-four percent of all convictions for state felonies come from guilty pleas, including 61% of all convictions for murder and non-negligent homicide, and "the consequence of what might seem on its face a small percentage change in the rate of guilty pleas can be tremendous." Warren E. Burger, The State of the Judiciary-1970, 59 A.B.A. J. 929, 931 (1970).

Even with this heavy reliance on plea bargaining, court caseloads have been steadily increasing. Between 1987 and 2004 state court caseloads increased 43% in courts of general jurisdiction and 45% in courts of limited jurisdiction. This increase has been driven by the criminal docket, which expanded 67% during that period.

States have struggled to keep up with this expansion, increasing the number of judges by 11% and the available support staff by a higher percentage, but the current economic crisis has put an end to this modest judicial expansion. The National Center for State Courts reports that eleven state court systems have conducted layoffs, twenty-three have instituted hiring freezes, nineteen have furloughed employees, nine have cut salaries, twelve have frozen salaries, and six have actually closed down courts.

If the decision in this case results in more motions to suppress – as the Ninth Circuit's approach surely would – states will not be able to hire additional staff and judges to handle them. Any increase in litigation over evidence prior to plea bargains will have to come directly out of funds and resources that are currently devoted to other elements of the criminal justice system.

B. The Ninth Circuit's approach would not ultimately benefit the affected criminal defendants, but would instead slow and in many cases impede their efforts to resolve their crimes.

For all these reasons, affirming the Ninth Circuit's decision could easily create more, rather than less, ineffective legal representation-by laying additional burdens on appointed attorneys and a legal system already struggling with large caseloads. Such a reduction in the average quality of representation is hardly in the interest of criminal defendants.

1. The Ninth Circuit's approach would also likely reduce the speed with which criminal cases are re-solved. Even before the recent budget cuts, criminal cases were slow affairs. In 2006 the median time between arrest and adjudication for state felons in the nation's largest counties was 92 days, with a median

of 364 days for murder defendants and 228 days for rape defendants.

Plea bargains keep these delays under control. In 2008 the median time between the filing of criminal complaint and its disposition in federal district court was 14.4 months if the defendant had a jury trial but only 6.6 months if he pled guilty. It is striking that the median time for criminal cases as a whole was only 6.8 months, because the overwhelming majority of cases are settled through plea bargains. Those averages would increase dramatically if courts were forced to adjudicate numerous motions before they could accept a deal, or worse, if the cases were brought all the way to trial.

This extra time and expense would not provide better legal advice for defendants. When an experienced defense attorney thinks it is in his client's best interest to accept a plea bargain, it will not help his client to instead force him to bring every potentially meritorious motion which might be available, on pain of being found ineffective. As Chief Justice Burger explained, "No lawyer wants to be called upon to defend the client's charge of incompetence for having failed to exploit all the procedural techniques which we have deliberately made available." Warren Burger, The State of the Judiciary-1970, 59 A.B.A. J. 929, 931 (1970). But "the most experienced defense lawyers know that [the] defendant's best interests may be best served in most cases by disposing of the case on a guilty plea without trial" Id.

2. The state sentencing statistics dramatically illustrate how a plea bargain can offer the defendant a better deal than he would get at trial. The average sentence for a person convicted of a felony at trial in state court in 2006 was 78 months, while the average sentence for a person convicted of a felony on a guilty plea was only 29 months. For someone convicted of murder or non-negligent homicide, the average trial sentence was

267 months (including jail, prison, and probation) while the average plea bargain sentence was 192 months-a difference of more than six years.

Pleading guilty can also help a murder defendant avoid the death penalty or a life sentence. Seven per-cent of people convicted by juries in murder trials in 2006 were sentenced to death, and 41% were sentenced to life in prison. By contrast only 1% of people who pled guilty are typically sentenced to death, and only 12% are sentenced to life in prison.

On the other side of the equation, only 1% of all felony defendants were acquitted at trial, and only 5% of murder defendants. It is not hard to see why an experienced and dedicated attorney might think that accepting a plea bargain in Moore's case was a better deal, even if it might be possible to suppress some of the evidence against his client.

3. A strategy of bringing extra motions before bargaining with the prosecutor's office, moreover, is generally not a good strategy for defendants. As Judge Bybee explains in his dissent, even if the motions succeeds, the "defense counsel loses a bargaining chip and will almost certainly face a less cooperative prosecutor." 574 F.3d at 1144 (J. Bybee, dissenting).

These practical considerations are illustrated in this very case. Moore, who confessed three times to three different sets of witnesses, was offered, and accepted, the shortest possible sentence for felony murder under Oregon law, a much more lenient sentence than he would have faced if he had been convicted of aggravated murder as contemplated by his attorney. *Id.* at 1140. It is hard to imagine that prosecutors would have offered him a better deal if he and his counsel had forced them to bring an indictment, then respond to a suppression motion that, whether or not it was granted, everyone knew would likely have no impact on the outcome at trial.

CONCLUSION

Through legal gymnastics, the decision below conflates the meaning of "prejudice" in the evidentiary error context with the meaning of that term in the very different right-to-counsel context. In so doing, the Ninth Circuit's approach creates a near de novo review of state court-sanctioned guilty pleas under AEDPA, thereby destroying the predictability and finality of negotiated plea resolutions to criminal matters.

Perhaps worst of all, by creating a *per se* rule that competent defense counsel must file meritorious suppression motions regardless of both professional judgment and strategic considerations, the Ninth Circuit's analysis promises to overburden an already encumbered legal system, even as it puts at risk the ability of criminal defendants to efficiently and favorably resolve criminal allegations against them. For all these reasons, the decision below must be reversed.

Respectfully submitted.

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